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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-749

LAWRENCE N. ADLER, Petitioner

V.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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OF WESTERN PENNSYLVANIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The Petitioner, Lawrence N. Adler, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Pennsylvania Supreme Court entered in this proceeding on July 2, 1973.

OPINIONS BELOW

The majority and the dissenting opinions of the Pennsylvania Supreme Court, review of which are sought in this Court, are reported at 453 Pa. 60 (1973). They are set forth at pages 1-a - 21-a of the separately bound Appendix. Other orders and opinions in this litigation are also set forth in the separately bound Appendix as follows:

1. Order of the Court of Common Pleas of Allegheny County, Pennsylvania dated May 28, 1970 denying a preliminary injunction (Appendix 31-a).

2. Adjudication and Decree Nisi of the Court of Common Pleas of Allegheny County, Pennsylvania dated September 13, 1971 (Appendix 32-a).

3. Opinion and Final Decree of the Court of Common Pleas of Allegheny County, Pennsylvania dated December 10, 1971 (Appendix 70-a).

4. Order of the Supreme Court of the Commonwealth of Pennsylvania denying a Petition for Reargument dated August 13, 1973 (Appendix 22-a).

JURISDICTION

The order and opinion of the Pennsylvania Supreme Court was entered on July 2, 1973. A timely Petition for Reargument was filed on July 11, 1973, and was denied on August 13, 1973 (Appendix 22-a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Under the Due Process Clause of the Fourteenth Amendment may a public hospital deny to a qualified nonsalaried physician on its medical staff the right to perform delicate medical procedures on patients who desire to have such procedures performed by that physician, without a hearing, based solely on a hospital rule which prohibits anyone other than salaried physicians from performing such medical procedures?

2. Under the Equal Protection Clause of the Fourteenth Amendment may a public hospital enforce a rule that only salaried physicians are entitled to perform certain delicate medical procedures when that rule has the effect of denying a qualified nonsalaried physician on the medical staff the privilege of performing such procedures when under hospital policy many other nonsalaried physicians continue to be permitted to perform other delicate medical procedures for their patients?

3. Are patients denied rights protected by the Due Process Clause of the Fourteenth Amendment if they are forced by a public hospital to receive treatment involving risks to their life or health from a physician employed by the hospital where such patients wish to have other qualified nonsalaried physicians on the hospital staff perform such procedures?

4. Are regulations affecting important rights such as those involved in the physician-patient relationship subject to closer judicial scrutiny under the Due Process or Equal Protection Clauses of the Fourteenth Amendment where such regulations are enacted or enforced by private parties who are not publicly elected or appointed although they are charged with the administration of public programs?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. Factual Background

The Petitioner, Lawrence N. Adler, seeks to perform delicate cardiac procedures in the Cardiovascular Laboratory of the Respondent, Montefiore Hospital of Pittsburgh Pennsylvania.* The Respondent Hospital has to date, without giving Petitioner any hearing, prevented him from performing medical procedures for Petitioner's patients in the Hospital's facilities.

While a voluminous record was created in the courts below, the relevant facts for present purposes were basically established by the pleadings and by the stipulation of facts filed by the parties (Appendix 81-a et seq.).

First, the record is clear with respect to Petitioner's qualifications. Following graduation from medical school in 1957, Petitioner served his required internship followed by a two-year residency in internal medicine. He next served a one-year residency in cardiology at Mt. Sinai Hospital in New York City and was then appointed Fellow for two years at the Thorndike Memorial Laboratory of Harvard University Medical School located in the Boston City Hospital. Dr. Adler, thus, received full training in the performance of such procedures as cardiac catheterization, coronary arteriography and the installation of pacemakers. He has published numerous medical articles and is the inventor of a special needle used in left heart catheterizations. He is board certified in internal medicine by the American Board of Internal Medicine, and he is also certified in the sub-specialty of cardiovascular diseases. He serves as a

*Montefiore Hospital is owned and managed by the Montefiore Hospital Association of Western Pennsylvania, the named Respondent in these proceedings.

Fellow in the American College of Cardiology, is active in the American Heart Association and was, at the time of the final hearing in the Court of Common Pleas, president-elect of the Western Pennsylvania Heart Association. The Respondent Hospital has stipulated that the Petitioner is experienced in performing all of the procedures which he seeks the right to perform through this lawsuit and that he is fully qualified to perform all such procedures (Appendix 101-a).

Second, with respect to Petitioner's affiliation with Respondent Hospital, the record shows that Dr. Adler has been on the hospital staff from July, 1963 down to the present. Indeed, prior to July, 1969 Dr. Adler had established the Cardiovascular Laboratory at the Respondent Hospital and had served as the part-time salaried director of that laboratory.

In July of 1969 the Hospital hired a full-time salaried director for the Cardiovascular Laboratory and relieved Dr. Adler of his duties in connection with this laboratory. At that time the Hospital refused to permit Dr. Adler to perform any procedures on patients in the Cardiovascular Laboratory based on a rule that only the full-time salaried director should be permitted to perform these procedures. Dr. Adler attempted, through Hospital channels, to have the policy reversed so as to permit him to treat his patients. When the Hospital denied his request for a hearing with respect to its decision refusing to grant him privileges in the Cardiovascular Laboratory, the present lawsuit was commenced.

Third, the record shows that the Respondent Hospital is a large, highly respected community hospital which is affiliated with the Medical School of the University of Pittsburgh. As a modern hospital affiliated with a large university medical center the Respondent has developed numerous sophisticated and specialized laboratories for the performance of a wide range of

procedures and tests. The public nature of the Hospital and its governmental involvement are detailed more fully in the third part of this statement.

With respect to the Hospital rule involved in this case, it is necessary to explore the nature of the procedures which the Petitioner desires to perform. While they serve different purposes and are performed for different reasons, cardiac catheterization, coronary arteriography and the installation of pacemakers all require making an incision in the body and require that a blood vessel be entered. In all of these procedures a catheter is inserted into the blood vessel and is threaded into either the chambers of the heart or into the blood vessels feeding the heart. These intimate procedures are all performed by physicians and the performance of these procedures involves grave risks to the patient.

In justifying a rule which excludes a nonsalaried physician from performing these procedures, the Hospital has pointed to other facilities in the Hospital where only full-time physicians are involved in the performance of tests. Thus in a number of specialty laboratories, in radiology and in the reading of electrocardiograms, full-time salaried physicians are involved usually to the exclusion of private practitioners.* In all of these situations, however, the physician is either supervising technicians in performing tests or the physician is reviewing an x-ray film or electrocardiogram actually taken by a technician. The physician is not directly treating a patient or performing procedures involving risk to the patient.

*In radiology while the physicians are full-time, they are not salaried by the Hospital but rather belong to a professional group. Also the Director of Radiology does permit private practitioners to perform procedures in that department.

While most of the twenty-five salaried physicians employed by the Hospital are engaged either in teaching or in supervising laboratory personnel, some salaried physicians do practice in the clinical departments of the Hospital. In these areas, including perhaps most importantly surgery, despite the presence of salaried physicians, the private physicians on the staff continue to have full privileges to perform all of the medical procedures which they had performed in the past.

Thus there exists a profound distinction between the intimate procedures which Petitioner seeks to perform on his patients and other procedures conducted in the laboratories of the Hospital. Similarly Petitioner has been denied access to perform surgical type procedures in the cardiology unit while other private physicians may perform surgery in other areas of the Hospital.

Unfortunately when the Petitioner endeavored to obtain a hearing within the Hospital to explore these factors, his request to be heard was summarily denied.

2. Proceedings in the Courts Below

Following the refusal of the Respondent Hospital to grant Petitioner a hearing before its Joint Conference Committee with respect to Petitioner's request to perform procedures in the Cardiovascular Laboratory, Petitioner commenced an action in equity in the Court of Common Pleas of Allegheny County, Pennsylvania seeking to enjoin the enforcement of the Hospital's exclusionary policy. In his complaint Petitioner brought suit on his own behalf, on behalf of his patients and on behalf of other physicians who wish to refer patients to the Petitioner for treatment (Appendix 84-a, 87-a). Petitioner showed in the lower courts that numerous patients who had sought to be treated by him had to be referred elsewhere (Appendix 106-a).

In addition, he introduced the affidavits of fellow physicians who stated that they desired to be able to refer patients to Dr. Adler for cardiac catheterization, coronary arteriography and the installation of pacemakers.

On May 28, 1970 the Court of Common Pleas of Allegheny County, Pennsylvania denied Petitioner's request for preliminary injunctive relief (Appendix 31-a). A final hearing was held in the Court of Common Pleas of Allegheny County in March, 1971 and following the filing of briefs and argument the chancellor filed his adjudication and entered a Decree Nisi denying Petitioner's request for relief (Appendix 32-a). Timely exceptions to the Decree Nisi were filed and on December 10, 1971 a court *en banc* of the Court of Common Pleas of Allegheny County, Pennsylvania filed its opinion and entered a final order denying Petitioner's request for relief (Appendix 70-a). A direct appeal was taken to the Supreme Court of the Commonwealth of Pennsylvania.

3. How Federal Question Was Raised

Petitioner raised the federal questions which are presented in this petition in Count II of the complaint which was filed in the Court of Common Pleas of Allegheny County. In paragraphs 28, 29, 30 and 31 of the Complaint Petitioner set forth the extensive state regulation, licensing and support of the Respondent Hospital (Appendix 86-a - 87-a). In its answer the Respondent admitted that it was a public institution and that its conduct and action would be "state action" (Appendix 95-a). Further, in the stipulation of facts, based on the admissions in the pleadings and on discovery undertaken during the lawsuit, the Respondent Hospital conceded that, by reason of its affiliation with a state related university, its financial support from the Commonwealth of Pennsylvania and the federal government under various programs, it was a public institution and

that its actions were "state actions" within the scope of the Fourteenth Amendment (Appendix 99-a - 100-a). While other non-federal reasons were advanced in support of Petitioner's request for injunctive relief, both the Court of Common Pleas of Allegheny County and the Pennsylvania Supreme Court expressly passed on the federal constitutional questions raised by the Petitioner. It is to review the lower courts' decision that the Fourteenth Amendment does not invalidate the action of the Respondent Hospital that this petition is presented.

REASONS FOR GRANTING THE WRIT

Providing adequate health care to the citizenry of this country has become a major governmental responsibility. Federal and state funding of health care programs have increased enormously. Increasing regulation and governmental review of all areas of the health care industry are evident. Moreover Congress is considering proposals from leaders from both major political parties for additional programs to meet the expenses of providing needed medical services. An extensive discussion of the history of governmental medical programs and a discussion of proposed new legislation is found in Havinghurst, "Symposium on the National Health Care Program," 35 *Law and Contemporary Problems* 229 (1970). The extent of governmental involvement in financing health care is documented in STAFF OF THE COMMITTEE ON WAYS AND MEANS, 92nd CONG. 1st SESS., BASIC FACTS ON THE HEALTH INDUSTRY, (COMM. PRINT 1971) and in U.S. DEPT. H.E.W., SOCIAL SECURITY ADMIN., COMPENDIUM OF NATIONAL HEALTH EXPENDITURES DATA (1973).

Not only has the level of local, state and federal support and control of the health care industry increased, but also the basic structure of health care delivery has been rapidly evolving.

Fifty years ago the primary health care provider was the individual physician who treated patients either in their homes or at the office. Hospitals were, within this overall picture, relatively unimportant. Today, on the other hand, hospitals and clinics are the primary health care providers. Thus access to the hospital is vital for both patients and physicians.

This case raises important questions which this Court has not had occasion to rule upon involving the rights of individuals who are confronted by the primary institution of our governmentally sponsored health care industry, namely, the modern public hospital. This petition seeks review of a case involving the rights of those who seek to practice the healing arts in our modern public hospital and the corollary rights of those who come to our hospitals seeking to be cured.

1. The rights of physicians who practice medicine in our governmentally supported or sponsored hospitals need to be clarified. The courts below concluded that the rights involved are not fundamental rights. In effect the rights were treated like economic rights or rights under social welfare programs which are broadly subject to state regulation.

Two prior opinions of this Court have touched on issues raised by the present case. In *Hayman v. Galveston*, 273 U.S. 414 (1927), this Court held that an osteopath did not have a protected right under the Fourteenth Amendment to practice on the staff of a public hospital. Later in *Barsky v. Board of Regents*, 347 U.S. 442 (1954), the majority opinion of this Court stated that the practice of medicine was a privilege granted by the state which possessed "plenary power to fix the terms of admission." 347 U.S. at 451.

The realities of modern hospital organization indicate that the application of these two cases to a physician's right to

practice in today's society needs to be reconsidered. The *Hayman* case, decided in an era when hospital practice was less important to a physician and involving, as it did, an osteopathic physician in an era when substantial differences existed between osteopathy and medical practice, is an uncertain guide in determining a physician's right to practice in modern public hospitals. Likewise the *Barsky* opinion, coming during the time when it was written, seems to unduly narrow the protection which should be afforded to a person's interest in practicing medicine.

Not only must the prior opinions of this Court be reconsidered in today's light but also it is important to review the opinion of the court below since it failed to grasp the fundamental nature of the physician's right to practice his profession. First, the right of one to follow any of the ordinary occupations of life has been held to be a fundamental right deserving of the full protection of the Constitution. *Meyer v. Nebraska*, 262 U.S. 390 (1923). Thus to permit a physician's right to pursue his calling to be infringed without close judicial scrutiny of the circumstances surrounding the infringement will weaken the protection which ought to be given to every person's fundamental right to pursue a chosen calling. Second, long before our Constitution was written the common law courts of England had recognized that physicians should be free from unwarranted interference with their practice in the patient's interests. Thus as early as *Dr. Bonham's Case*, 8 Co. Rep. 114a, 2 Brownlee 255, 77 Eng. Rep. 647 (C.B. 1610), the English law had recognized that the right of a physician to practice was entitled to protection if his patients were to be afforded the opportunity to be treated by the person of their choice. In explaining the purpose behind a statutory provision permitting a physician who was not licensed in the City of London to attend patients for a period of a month without obtaining a license. Lord Coke stated:

> "... gentlemen, and others, come upon divers occasions to London, and when they are here become subject to diseases, and thereupon they send for their physicians in the country, who know their bodies, and the cause of their diseases; *now it was never the meaning of the act to bar any one of his own physicians*." 8 Co. Rep. at 117b (Emphasis supplied.)

The majority of the Pennsylvania Supreme Court expressly failed to recognize that the right of a physician to practice medicine was a fundamental right deserving of protection both for the sake of the physician and the patient. This approach seems to be in direct conflict with the nature of the review which this Court undertook in the recent abortion cases which involved related issues. It is respectfully submitted that the type of review which this Court undertook with respect to legislation which interfered with physicians' and patients' rights in *Doe v. Bolton*, 410 U.S. 179 (1973), ought to be required in any situation where a physician's right to practice in a hospital and the correlative right of the physician's patient to be treated is infringed.

2. Not only is it important for this Court to examine the fundamental nature of the right of a physician to practice his profession but it is equally important to set limits on the practices and procedures which may be followed by public hospitals in balancing the competing claims of patients and physicians. In the present case the Hospital has chosen to adopt a rule which bars some physicians but not others from treating their patients without regard to either the patient's views or the physician's qualification to perform the procedures. In the present case the justification seems to center on the alleged requirements of a teaching program. There is, however, no showing that the Hospital considered any other alternatives to the

adoption of a unilateral rule which had the effect of creating an irrebutable presumption that nonsalaried physicians cannot perform medical procedures on their patients. It is respectfully suggested that the procedures followed by the Respondent Hospital in this case violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. If a physician's right to practice is to be infringed it is respectfully submitted that this should be done only following a fair and reasonable procedure which balances the interest requiring regulation with the physicians and the patient's interest in permitting the physician to continue to perform procedures. Regulations, if required, should be narrowly drawn to serve only the reasonable purposes for which they are created and some procedure for individualized hearing should be evolved. This appears to be the clear teaching of *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Vlandis v. Kline*,___U.S.___, 93 S.Ct. 2230 (1973). Petitioner would respectfully urge that the principles enunciated in those cases are applicable to modern public hospitals and that the decision of the court below conflicts with the opinions of this Court.

Finally, situations like the present one where private surgeons on the staff of the Respondent Hospital are permitted to perform procedures on their patients while private cardiologists are denied the right to treat their patients ought to be avoided in the interest of treating all people equally under the law. For a public institution to permit non-essential or accidental differences to affect important rights is inappropriate. The patient who requires heart surgery might have free choice as to who is to perform the surgery while the patient who needs a pacemaker would have no such freedom of choice. Likewise the physician who has trained to do delicate neurosurgery continues to be free to utilize his or her talents to the fullest while the person who has spent years training to perform cardiac

catheterization is denied the opportunity to utilize his or her highly developed skills.

3. In our society we have endeavored to recognize that the truly crucial personal decisions affecting one's life fall within an area of privacy into which the law ought not intrude. As our society grows more complex and, particularly as our modern hospitals become more sophisticated and specialized, it becomes important that fundamental rights not be lost sight of in the name of progress or efficiency. In modern medicine life is prolonged by means which were not deemed possible in an earlier era. Organs are transplanted from one person to another. Mechanical replacements for natural organs have been developed. Highly risky and, indeed, experimental surgery has worked wonders. The right, however, of the individual patient to make the ultimate decisions with respect to his or her life has caused enormous problems to our courts in the setting of today's modern hospital. See, for example, the several opinions of the United States Court of Appeals for the District of Columbia Circuit in denying a petition for rehearing by the court *en banc* in *Application of the President and Directors of Georgetown College Inc.*, 331 F.2d 1610 (D.C. Cir. 1964).

Petitioner would urge that this Court ought to review the decision of the court below both because of the importance of the rights of persons to dictate what is to happen to their life in a public hospital setting but also because the opinion of the lower court would appear to be in conflict with recent decisions of this Court. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) and in *Doe v. Bolton*, 410 U.S. 179 (1973), this Court recognized that a physician due to his relationship with his patients had standing to raise questions concerning the impact of the Respondent's conduct on clear and vital rights of its patients.

4. The growth of local, state and federal support for the health care industry is not unique. Governmental support in financing of numerous programs affecting the welfare of the citizenry has grown rapidly. In many instances the government has chosen to pursue programs designed to enhance the public health, safety or welfare by permitting essentially private bodies to administer these public programs. While a number of commentators have suggested that governmental policy making authority should never be given to private parties, see, e.g. Reich, "The New Property," 73 Yale L.J. 733 at 783 (1964), it is not necessary to consider that issue in this case. However, where private agencies do pursue governmental programs which affect important rights of the public, unless our courts subject the actions of such agencies to close judicial scrutiny, there is no way in which the public can be protected against the arbitrary abuse of governmental power. Since the court below by relying on cases like *McGowan v. Maryland*, 366 U.S. 420 (1960), chose to treat the regulation of the Respondent Hospital as being legally the equivalent of a statute enacted by a duly elected legislature, it refused to make inquiry into the factual basis for the Hospital's rule or into the procedure followed by the Hospital. The effect of this approach will be to permit the growth of private guilds enjoying governmental power and functioning without any effective mechanism to protect the citizens who must deal with such private agencies. See GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS, 105-151 (1968). In view of the proliferation of government programs which are implemented and administered by private agencies it is respectfully submitted that this Court ought to consider the proper role of the judiciary in examining rules and regulations of such private agencies performing governmental functions where the actions of such agencies impinge upon important and basic rights of our citizens.

In summary, a rule made by the director of medicine and acquiesced in by the board of a public hospital has deprived Petitioner and Petitioner's patients of vital and important personal rights. If the opinion of the court below is permitted to stand it will not merely deprive the Petitioner and his patients of their rights but, due to an erroneous reading of requirements of the Fourteenth Amendment, the rights of all physicians and patients in the Commonwealth of Pennsylvania will be seriously undermined. Perhaps more importantly, if the Court does not grant review of this case, physicians, patients and public hospitals throughout the country will be without guidance as to the protection which our Constitution affords to people in our modern public hospitals.

CONCLUSION

For the reasons stated, this writ should be granted and the decision of the Supreme Court of the Commonwealth of Pennsylvania should be reversed.

Respectfully submitted,

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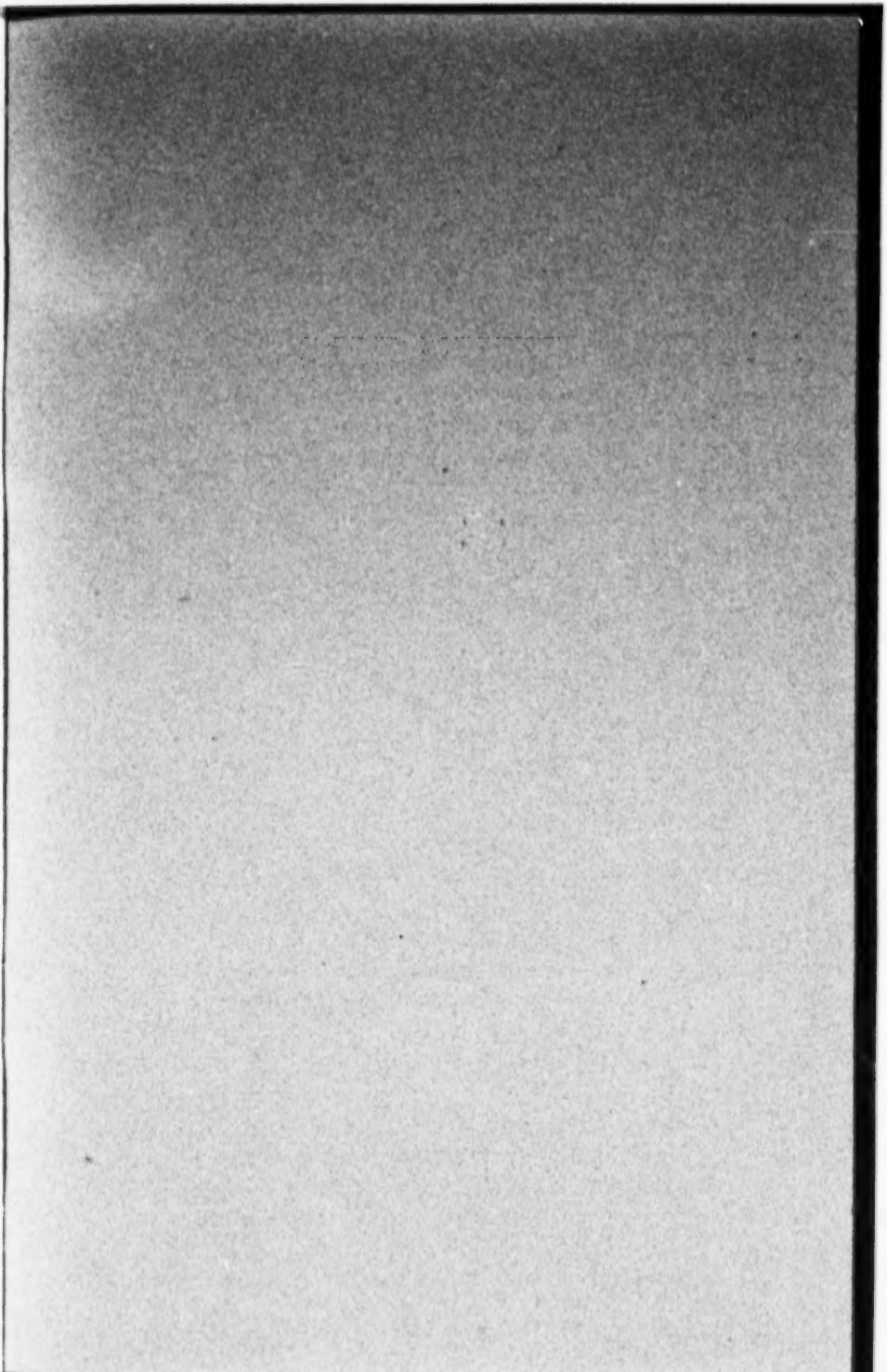

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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Appendix A

1-a

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

LAWRENCE N. ADLER, *Appellant* v. THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, *Appellee*	No. 52 March Term, 1972 Appeal from the Final Decree dated December 10, 1971 of the Court of Common Pleas, Civil Division of Allegheny County, Pennsylvania at No. 1501 July Term, 1970.

OPINION OF THE COURT

POMEROY, J. FILED: July 2, 1973

This appeal requires us to decide whether a private physician associated with a public teaching hospital is entitled to render what he considers comprehensive medical treatment to his patients by use of certain hospital facilities and equipment, or whether his claimed right to do so must yield to rules and regulations established by the hospital for its own effective administration, and which forbid such use. We resolve the conflict in favor of the hospital.

Appellant, a physician specializing in cardiology, and a member of the medical staff of appellee, The Montefiore Hospital Association of Western Pennsylvania (herein "Montefiore" or "Hospital"), brought this suit in equity to enjoin the Hospital from denying him the right to perform certain procedures in the Cardiac Catheterization Laboratory (Laboratory) of the Hospital. After trial, the chancellor entered an adjudication denying the requested relief. Exceptions to the findings of fact and conclusions of law were dismissed by a court *en banc*, and a final decree was entered. This appeal followed.

Appendix A

2-a

We have reiterated time and again the scope of our review in an appeal from a decree in equity following a hearing or trial. As we put it recently in *Cowen v. Krasas*, 438 Pa. 171, 173, 264 A.2d 628 (1970):

> "The scope of our review is clear: A chancellor's findings of fact, when approved by the court *en banc*, have the force and effect of a jury verdict and will not be disturbed on appeal if supported by adequate evidence. Stewart v. Watkins, 427 Pa. 557, 235 A.2d 604 (1967); Girard Trust Bank v. Sweeney, 426 Pa. 324, 231 A.2d 407 (1967); and Kalyvas v. Kalyvas, 371 Pa. 371, 89 A.2d 819 (1952). However, the chancellor's inferences and the conclusions from the facts as found to exist are always subject to review (Kemp v. Majestic Amusement Co., 427 Pa. 429, 234 A.2d 846 (1967)), as well as his application of the law."

The factual posture of this case has been set out extensively in the findings of fact of the chancellor, which incorporated a lengthy stipulation of facts by the parties. Although appellant filed numerous exceptions to the adjudication, he did not specifically allege that any finding was unsupported by competent evidence; neither does he do so in his brief to this court. Like the court *en banc*, however, we have undertaken an independent review of the record and conclude that the findings of the chancellor, summarized below, are supported by competent evidence.

Appellant is a practicing cardiologist on the active medical staff of Montefiore and of three other Pittsburgh hospitals. In addition, he maintains two private offices in separate sections of

the City.[1] Appellee is a non-profit hospital corporation organized under the laws of this Commonwealth. Its corporate purpose, as expressed in the articles of incorporation, is the "conducting and operating [of] a hospital and dispensary; and in connection therewith carrying on such educational, philanthropic and scientific activities as are incidental to hospital work . . ." Pursuant to these goals, the Hospital since 1957 has sought increasingly to integrate its operations into the activities of the University of Pittsburgh School of Medicine, of which it became an affiliate in 1969. The Hospital is also a formal corporate member of the University Health Center.

Under its by-laws, the Hospital is divided into five departments: Medicine, Surgery, Radiology, Anesthesiology, and Pathology, each with its own full-time chief physician who has authority over all departmental activities within the Hospital. The Division of Cardiology and its Laboratory are within the Department of Medicine.

From July 16, 1963 until July 1, 1969 appellant was employed by the Hospital as the part-time, salaried director of its Laboratory. During this same period he was also on the Active Staff of the Department of Medicine, possessing the same rights and privileges as all other staff physicians, specifically all other staff cardiologists. As director of the Laboratory,

[1] At no time during these proceedings have Dr. Adler's professional qualifications been questioned, nor do we intend by this opinion to reflect adversely on these qualifications. The parties stipulated that before coming to Montefiore in 1963, appellant received his M.D. degree from the University of Pittsburgh in 1957, interned at Montefiore during the year 1957-8, served a residency in internal medicine at Presbyterian Hospital in Pittsburgh from 1958-60, served a residency in cardiology at Mt. Sinai Hospital for the year 1960-61, and was a Research Fellow in cardiology from 1961-63 at the Harvard Medical School. Appellant was certified by the American Board of Internal Medicine in 1964, and again by the same group in 1969 with a sub-specialty in cardiovascular diseases. At all relevant times he has been licensed to practice medicine in Pennsylvania and at the time of trial was the president-elect of the Western Pennsylvania Heart Association.

appellant was the only cardiologist on the Hospital staff authorized to perform cardiac catheterizations and related procedures, except cardioversions and the installation of pacemakers.[2] Although four other qualified cardiologists were on the staff, all their patients who required catheterizations were referred to appellant.[3]

On July 1, 1969, appellant's employment as part-time director of the Laboratory was terminated, and Dr. Edward Curtiss was hired as his full-time replacement. The establishment of the Laboratory in 1963, its subsequent expansion, and finally its restructuring on a full-time basis in 1969 were part of the evolution of Montefiore from a community hospital to a major teaching institution responsible for the training of medical students, interns and residents.[4] Contemporaneously with these changes, many of the physicians employed on a part-time basis to direct the specialty units and laboratories were replaced with full-time physicians.[5] After the part-time employees were

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[2]Cardioversions were performed by other cardiologists; temporary pacemakers were installed by the salaried physician in charge of the Coronary Care Unit on a rotating monthly basis; and installation of permanent pacemakers was the responsibility of the Director of the Laboratory assisted by a thoracic surgeon.

[3]In 1967, when another qualified staff cardiologist orally requested permission to perform the above procedures, the request was refused on appellant's recommendation. Appellant's feeling at that time was that the number of physicians permitted in the Laboratory should be kept to a minimum and that everyone's best interests would be served if he as director, were the only one permitted to perform the procedures.

[4]The chancellor found that from 1962 to the present, students rotating through the Hospital rose from 10 to 110; interns and residents rose from 14 to 40; clinical Fellows from zero to 7; and that at the time of trial, 45% of the students at the University of Pittsburgh School of Medicine received their training in internal medicine at Montefiore, compared to a much smaller percentage seven years earlier.

[5]Those units which, at the time of hearing, were under the charge of full-time heads were renal or kidney, gastroenterology, special hematology, adrenal, thyroid and nuclear medicine, clinical immunology, blood bank, ambulatory services, radioimmunology and cytogenics, and the cardiac catheterization laboratory.

replaced, they were no longer permitted to perform the specialized procedures pertaining to their units, even though they continued to be fully qualified to do so. This was true also with respect to the Laboratory, with the result that appellant was not allowed access to it to perform procedures therein even though such procedures were with respect to his own patients. The prior policy and practice established under Dr. Adler's regime as director was thus continued under Dr. Curtiss' directorship. It is this policy of exclusivity, not his discharge as an employee of the Hospital, which appellant challenges as unlawful.

At the same time that appellant's employment with the Laboratory was terminated, he was hired as the salaried, part-time chief of Montefiore's Coronary Care Unit. On March 1, 1970, he was relieved of these duties for alleged failure to follow hospital rules, attempts to subvert the system, failure to fulfill teaching commitments, and removal of expensive equipment from the premises without authorization. Again, this discharge is not here challenged. Eight months after his replacement as Director of the Laboratory, and during a period when his position with the Coronary Care Unit was in jeopardy, appellant requested a hearing before the Joint Conference Committee of the Hospital, as permitted by the Hospital by-laws, on the ground that his exclusion from the Laboratory amounted to a reduction of privileges.[6] The request was denied.

The chancellor's findings of fact included a finding that "[c]ardiac catheterizations and related procedures are essentially team functions which are complicated procedures and require

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[6] Article III, Section V, Subsection 1, of the by-laws of the Hospital provides: "In any case where reappointment [to the Staff] is not recommended or where reduction of privileges is recommended, the Executive Director shall notify the physician or dentist concerned and he shall be given an opportunity to appear before the Joint Conference Committee.

other personnel, usually technicians or nurses, besides the physician actually performing the procedure." Though generally diagnostic in nature, these procedures involve definite risks. Potential complications include, among others, death, serious infections, cardiac complications, and serious bleeding. Because these and less serious side-effects can arise without warning and after the probe has been completed, there is a need for monitoring and close observation for several hours after completion of the procedures.

The chancellor further found that the challenged policy, i.e. permitting only the full-time director of the Laboratory to the exclusion of other qualified cardiologists on the active staff to perform the procedures involved, was an accepted practice in major university-affiliated teaching hospitals. Based upon voluminous expert testimony, he concluded that this practice improves patient care, the teaching program and efficient administration in the following ways: (1) as the procedures are essentially team functions, the members are able to develop a routine as well as a familiarity with the equipment and its utilization by a particular physician; (2) full-time presence at the Hospital by the operator permits optimal patient care because complications can be treated by the physician who performed the procedure; (3) physician competence can be maintained only by the performance of at least three cardiac catheterizations per week, and in a low volume laboratory such as Montefiore's this can be assured only by restricting performance to the full-time director; (4) a full-time physician-director has the extra time necessary to teach effectively the many medical students, interns and residents who utilize the Laboratory as a basic learning tool; (5) scheduling problems are reduced when it is not necessary to attempt to accommodate practitioners on the staff who have outside commitments; (6) procedures should be scheduled when possible in the morning so that the performing physician can be available in the afternoon should complica-

tions arise; (7) a full-time director insures that the non-professional but essential administrative details of operating a laboratory will be performed by a physician; were the director's volume of procedures reduced by allowing others to perform them, it would be extremely difficult to obtain a qualified cardiologist willing to assume the administrative functions; (8) equipment breakdowns and lack of reliability are minimized by limiting equipment utilization to a single physician; and (9) appellee has a substantial and legitimate interest in insuring the optimal performance of its employees and use of equipment because it is liable for negligently caused injuries.

From the foregoing findings, the chancellor concluded that the challenged policy was related to the purposes and objectives of the Hospital, was reasonable, and therefore did not violate either the due process or equal protection clauses of the Fourteenth Amendment; that appellant was accorded the same rights and privileges as all other staff cardiologists not employed by the Hospital and therefore was not entitled to a hearing either by his contract with the Hospital or under the procedural due process requirements of the Fourteenth Amendment; that the Hospital's policy has not interfered with the patient's right to choose his own physician; and that appellant has not been deprived of any privilege necessary to treat his patients effectively. As indicated at the outset, we agree with the conclusions of the lower court and affirm its decree.

STATE ACTION

We recognize at the outset that the Fourteenth Amendment of the Constitution of the United States applies only to "state action" and not to private conduct. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948); *Civil Rights Cases*, 109 U.S. 3 (1883). In *Burton*, supra, the United

States Supreme Court held that essentially private conduct does not do violence to the Fourteenth Amendment (in that case the Equal Protection Clause) unless the state has become involved to some significant extent. The amount of involvement must be measured by the facts of each particular case. The parties in the case at bar stipulated, and the chancellor accepted without question, that "[b]y reason of the affiliation with a state-related university [the University of Pittsburgh] and the financial support from the Commonwealth of Pennsylvania and the Federal Government, MONTEFIORE HOSPITAL is a public institution and the conduct and actions of MONTEFIORE HOSPITAL are 'state actions' within the scope of the Fourteenth Amendment to the Constitution of the United States." Although we do not consider that this legal conclusion to which the parties agreed is necessarily binding on the courts having responsibility to render a decision in this action, we do not consider it necessary to question it in this case. For assuming, without deciding, that the Hospital's policy complained of does constitute state action, we conclude that it does not violate the Fourteenth Amendment.[7] We deem it appropriate, nevertheless, to mention briefly what appear to us to be the relevant aspects of the question of when a hospital can be considered to be "public" for purposes of the Fourteenth Amendment.

Under traditional classifications, a hospital has been considered either strictly public or strictly private. This formulation was expressed by the Supreme Court of Vermont thusly:

> "[A] public hospital is an instrumentality of the state, founded and owned in the public interest, supported

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[7]While we do not decide today the state action question, we note that the issue is not a simple one. The United States District Court for the Western District of Pennsylvania recently held in a case involving 22 U.S.C. §1983 that the Commonwealth of Pennsylvania was not sufficiently involved in the sex-discrimination practices of the University of Pittsburgh, a state-supported institution, to constitute state action. *Braden v. University of Pittsburgh*, 343 F.Supp. 836 (W.D. Pa. 1972).

> by public funds, and governed by those deriving their authority from the state. A private hospital is founded and maintained by private persons or a corporation, a state or municipality having no voice in the management or control of its property or the formulation of rules for its government. Edson v. Griffin Hospital, 21 Conn. Sup. 55, 144 A.2d 341; Levin v. Sinai Hospital of Baltimore City, 186 Md. 174, 46 A.2d 298; 41 C.J.S. Hospitals § 1, p. 332."

Woodard v. Porter Hospital, Inc., 125 Vt. 419, 422, 217 A.2d 37, 39 (1966).

Following the decision in *Burton v. Wilmington Parking Authority*, supra, however, the rigid polarity in this classification has begun to erode as courts increasingly recognize a third category which may be termed "quasi-public". See, *Silver v. Castle Memorial Hospital*,____Haw.___,___ P.2d____(1972). Fitting this label are hospitals which, though essentially private under the traditional classification, are marked by either one of two sorts of public characteristics. One of these two varieties is a hospital which receives funds in large measure from public sources and through public solicitation, receives tax benefits by reason of its nonprofit and nonprivate character, and holds a virtual monopoly in the area it serves. *Silver v. Castle Memorial Hospital*; supra; *Greisman v. Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817 (1963); *Sussman v. Overlook Hospital Assoc.*, 95 N.J. Super. 418, 231 A.2d 389 (1967); *Woodard v. Porter Hospital, Inc.*, supra. The other type of "quasi-public" hospital is one which receives construction funds from the federal government and participates generally in the benefits available under the Hill-Burton Act, 42 U.S.C. § 291 (1965). *Sams v. Ohio Valley General Hospital Assoc.*, 413 F.2d 826 (4th Cir. 1969); *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964), rejecting the earlier holding of the same court in *Eaton v. Board of Managers, etc.*, 261 F.2d 521 (4th Cir. 1958), cert. den. 359 U.S. 984, 3

L.Ed.2d 934; *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938, 11 L.Ed.2d 659; *Citta v. Delaware Valley Hospital*, 313 F.Supp. 301 (E.D.Pa. 1970). As the cited cases indicate, this third category of hospital has been held to be sufficiently public in nature so that the "state action" doctrine applies. Thus the actions of such hospitals are subject to judicial review with respect to charges of violation of the Fourteenth Amendment. We think that the trend set by the above decisions is a salutary one.

While it is highly probable that Montefiore does in fact qualify as a "quasi-public" hospital, particularly under the Hill-Burton test, we are foreclosed from making that determination due to the paucity of data in the record (no doubt resulting from the stipulation referred to above). In light of our ultimate disposition of the constitutional issues, however, we will accept the stipulation of the parties that Montefiore is a public hospital.

SUBSTANTIVE DUE PROCESS

Appellant contends that the challenged practice of the Hospital is unreasonable and unrelated to the objectives sought to be achieved, and therefore violates his right to substantive due process guaranteed by the Fourteenth Amendment. In *Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, (1923) the United States Supreme Court included, within the concept of liberty protected by the Fourteenth Amendment, the right to engage in any of the common occupations of life. "The established doctrine", said the court, "is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S. at 399, 400. See also, *Board of Regents of State College v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972)

(1972) *Schware v. Board of Law Examiners*, 353 U.S. 232, 1 L.Ed.2d 796 (1957). By the same token, "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307, 12 L.Ed.2d 325 (1969). See also, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 12 L.Ed.2d 992, 998 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L.Ed.2d 231, 237 (1960); *Schware*, supra.

Our own decisions have recognized these same limitations on governmental powers:

> "[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

Gambone v. Commonwealth, 375 Pa. 547, 551, 101 A.2d 634 (1954). Our most recent exposition of this approach, as a matter of state constitutional law, is to be found in *State Board of Pharmacy v. Pastor*, 441 Pa. 186, 191-2, 272 A.2d 487 (1971). While the degree to which the courts should undertake to review the rationality of legislative enactments is a matter of unending debate and change,[8] we have no hesitancy in viewing

[8] Mr. Justice Stewart, concurring in *Roe v. Wade*, ___ U.S. ___ at ___, ___ L.Ed. 2d ___ (1973), which held the Texas criminal abortion statute unconstitutional, observed:

> "In 1963, this Court, in Ferguson v. Skrupa, 372 U.S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it: 'We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. (Citation omitted).' "

the judicial role in the area of hospital administration in the same light as did the Supreme Court of New Jersey in *Greisman v. Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817, 824 (1963). Striking down the denial of staff privileges to a doctor of osteopathic medicine, the court held:

> "Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked. . for a reason unrelated to sound hospital standards and not in furtherance of the common good."

See also, 40 American Jurisprudence 2d, Hospitals and Asylums, §§8-10.

Viewing the decisions of the United States Supreme Court since *Ferguson v. Skrupa*, supra, particularly *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510 (1965) and *Board of Regents v. Roth*, supra, Justice Stewart concluded that substantive due process, and consequently a considerable degree of judicial intervention, is still very much alive. Such a view comports with the philosophy consistently followed by this court:

> "The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts."

Gambone, supra, 375 Pa. at 551-2. See also, *State Board of Pharmacy v. Pastor*, supra.

Returning to the facts of the present case, the record shows that patient care, teaching and efficient administration comprised Montefiore's three main objectives following its affiliation with the University Health Center. The voluminous expert testimony, though conflicting, supported the lower court's conclusion that Montefiore's challenged practice would promote those goals in the nine clearly discernible areas catalogued above, viz: (1) teamwork; (2) physician competence; (3) the treating of complications; (4) teaching; (5) scheduling; (6) assuring morning procedures; (7) administration of the Laboratory; (8) equipment maintenance; and (9) optimal use of manpower and equipment. It followed, said the chancellor, that the Hospital regulation was reasonable and therefore did not offend due process.

Appellant contends, however, that his admitted competence in performing the Laboratory procedures renders the challenged rule invalid, if for no other reason than that it reached too broadly. His argument glosses over the complicated nature of the demands facing the Hospital, i.e. serving not only the needs of appellant and his patients, but those of many other physicians and their patients, as well as the University and its students. While appellant was qualified to provide *good* service within his own limited field of activity, Montefiore determined that the *best* accommodation of everyone's requirements could be achieved only by limiting the conduct of Laboratory procedures to the full-time director. Were Montefiore to open its Laboratory doors to appellant, it would follow that the same privilege would have to be accorded the other qualified staff cardiologists so requesting, thereby rendering even more difficult the attainment of the Hospital's goals. As the reasonableness of the challenged policy is amply supported by the record, we find no Due Process violation.

What has been said in effect disposes also of appellant's related argument that the rights of his patients to be treated by the physician of their choice have been infringed. This alleged "right" is asserted as one of the personal rights reserved to the people under the Ninth Amendment. See *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510 (concurring opinion of Mr. Justice Goldberg, 381 U.S. at 492, 493; but see the dissenting opinion of Mr. Justice Black, 381 U.S. at 518-521). No representation has been made to us of any dissatisfaction of Dr. Adler's patients with the challenged restriction at the cardiac Laboratory, nor has there been any argument that this appellant has standing to represent his patients as a class in this litigation. Putting those important points aside, however, the record fails to show any impairment of the physician-patient relationship. The task facing a hospital which attempts to provide comprehensive medical services is complex. Under the regulations in force at Montefiore, similar to those of other like hospitals, one's personal physician is not the operator in various areas of diagnosis and care, including radiology, pathology, anesthesiology, the coronary care unit, and the nuclear medicine unit, as well as the Laboratory here in question. To require that the procedures administered in these departments shall be performed by hospital-designated operators is not to deny the appellant or any other qualified staff physician the right to treat his patient in the hospital, or the corresponding right of a patient to the choice and general services of his own physician. See, *Benell v. City of Virginia*, 250 Minn. 559, 104 NW2d 633 (1960). In short, there is no right of which we are aware that would permit a patient to insist on his own doctor's performance of the procedures conducted in a laboratory or other facility furnished, equipped and staffed by the Hospital.

EQUAL PROTECTION

Does Montefiore's policy of restricting the access of staff cardiologists to the Laboratory, while permitting staff surgeons unlimited use of the operating rooms, violate the Equal Protection Clause of the Fourteenth Amendment? While the Hospital would justify its exclusionary Laboratory policy on grounds that it promotes patient care, proper teaching, and effective hospital administration, appellant points out that private surgeons on the Hospital staff are permitted to utilize the operating rooms to perform their procedures, many of which involve a higher incidence of risk than those in the Laboratory. This policy as to surgeons, it is argued, has resulted in no noticeable impairment of the Hospital's patient care, its teaching program, or its effective administration.

In *McGowan v. Maryland*, 366 U.S. 420, 425-6, 6 L.Ed.2d 393 (1961), the Supreme Court said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See Kotch v. Board of River Port Pilot Comrs. 330 U.S. 552, 91 L.Ed. 1093, 67 S. Ct. 910; Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 79 L.Ed.1070, 55 S. Ct. 538; Lindsley v. Natural Carbonic Gas Co. 220 U.S. 61, 55 L.Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C 160; Atchi-

son, T.&S.F.R. Co. v. Matthews, 174 U.S. 96, 43 L.Ed.909, 19 S. Ct. 609."

Unless a classification is inherently suspect, such as those based on alienage, nationality or race, and thus calls for "close judicial scrutiny", see, e.g., *Graham v. Richardson*, 403 U.S. 365, 372-3, 29 L.Ed.2d 534 (1971) and cases cited therein, the test remains today whether the challenged policy may reasonably be justified. *Dandridge v. Williams* , 397 U.S. 471, 485, 25 L.Ed.2d 491 (1970).[9]

Our task, therefore, is to examine the regulation of the Hospital to determine whether the difference in treatment accorded to cardiologists and surgeons is reasonably justified by the pertinent facts. We agree with the lower court that a useful analogy can be drawn with those decisions which have upheld against equal protection attack the maintenance by hospitals of closed radiology (x-ray) departments. The Minnesota Supreme Court upheld such a practice on grounds that it (1) was advocated by the American College of Radiologists as being in the

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[9]The language of Mr. Chief Justice Burger, writing for a unanimous court in *Reed v. Reed*, 404 U.S. 71, 76, 30 L.Ed.2d 225 (1971), viz.:

> "The Equal Protection Clause. . .does. . .deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

has suggested to one close observer of constitutional trends that perhaps the test of equal protection has become a more stringent one. See Gunther, *In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). A reading of the separate opinions in *Frontiero v. Richardson*, ___U.S.___, ___L.Ed.2d___, 41 U.S.L.W. 4609 (May 14, 1973), sustaining a challenge to the armed services policy of granting dependency allowances for wives but not husbands makes clear that the Court does not wish to alter traditional equal protection analysis. But at the same time agreement cannot be reached whether or not to treat sex classifications as inherently suspect.

best interests of hospitals, patients, and physicians generally; (2) did not interfere with the right of the qualified physician to treat his patient in the hospital; and (3) was part of the general advancement in medical specialization designed to protect patient safety and the hospital from negligence liability. *Benell v. City of Virginia*, supra. To the same effect, see *Letsch v. Northern San Diego County Hospital District*, 55 Cal. Rptr. 118, 246 Cal. App. 2d 673 (1966); *Blank v. Palo-Stanford Hospital Center*, 44 Cal. Rptr. 572, 234 Cal. App.2d 377 (1965).

Appellant points out that the American Heart Association, unlike the American College of Radiologists, does not advocate a closed laboratory facility. We are not certain of the equivalence of the two organizations in regard to the two branches of medicine involved, but in any event do not consider the non-advocacy of the Heart Association in any way determinative. Expert testimony adduced at trial in favor of the full-time director concept, although possibly not as authoritative as the formal recommendation of a professional board, at least shows that a large proportion of cardiologists do favor the practice challenged here. In addition, as with radiology, the performance of procedures within a cardiology laboratory is essentially diagnostic in nature and does not interfere with the right of the physician to prescribe for and treat his patient. Although the Laboratory procedures are performed only by the Director, a specialist, the physician-staff member in the final analysis controls what is to be done, the interpretation of the tests, and the treatment. Finally, the Hospital's expert evidence underscored the essential differences between x-ray or cardiovascular laboratory procedures, where full-time team functioning is favored, and surgical operations, where they are not. According to Dr. Richard Gorlin, Chief of the Cardiovascular Division and Associate Professor of Medicine at the Peter Bent Brigham Hospital in Boston:

> "An analogy is often erroneously made with a surgical operating team: during general surgery however the number of manuevers are stylized and set for each team member such as, Operating Nurse, and apply to all participating doctors. In a catheterization laboratory the number of technicians, nurses, etc. is multiple and varying in applications - doctor idiosyncrasy is greater including type of equipment and its operation, modes of physiological measurement or of angiographic data retrieval. Furthermore patient crises are manifold running the gamut from pain and discomfort to cardiac arrest and death."

A second expert, Dr. James Leonard, Associate Professor of Medicine and Director of the Cardiology Division of the University of Pittsburgh School of Medicine, testified that whereas general surgery depends primarily upon the surgeon himself, procedures in a cardiac laboratory, like a "moon shot", are highly dependent upon sophisticated equipment requiring a large team and full-time people to assure quality control for the entire operation. Even in surgical procedures, however, according to Dr. Leonard, the trend is toward full-time teams, due to the increasing use of complicated equipment such as the heart-lung machine.

From what has been said it is clear that in addition to promoting desirable hospital objectives, Montefiore's policies for the Laboratory reasonably treat cardiologists and surgeons differently. We conclude, therefore, that Dr. Adler has not been denied the equal protection of the law because of the challenged regulation.

RIGHT TO HEARING

Appellant next contends that before denying his request to perform procedures in the Laboratory, Montefiore was bound,

both by its own by-laws and the due process clause of the Fourteenth Amendment, to afford him a hearing.[10] Significantly, the lower court found that when appellant was permitted to perform procedures in the Laboratory during the period 1963-1969, his authority to do so stemmed solely from his employment position and not from membership on the medical staff of the cardiology department. In fact, no cardiologist other than the director has ever held privileges in the Laboratory. When appellant was replaced as director, therefore, any rights he may have had to a hearing hinged solely on his staff membership (coupled, of course, with his qualifications to perform cardiac catheter procedures.)

In its recent decision in *Board of Regents of State College v. Roth*, supra, the United States Supreme Court, faced with a similar due process claim of a non-tenured college professor who had been denied reemployment for the following school year, said in pertinent part:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to their benefits. . . ."

[10] As we said earlier at p. 5, at no time has appellant challenged the right of the Hospital to discharge him as the part-time employee-director of the Laboratory or contended that he was entitled to a hearing to contest this dismissal.

U.S. at ___, 33L.Ed.2d at 561. As in *Board of Regents*, where the teacher's contract supported no possible claim of entitlement to re-employment, so here, appellant's position on the medical staff provides no basis for his claim to Laboratory privileges. His rights to admit patients and to prescribe treatment, and the remainder of the cluster of privileges accorded to all staff members, have in no way been diminished, but remain in all respects equal to those of other staff members. Thus, his claim of the denial of procedural due process is based, in the words of the Supreme Court, on nothing more than a "unilateral expectation" and is devoid of merit.

For similar reasons we reject appellant's claim that Article III, Section V of the Medical Staff By-Laws required a hearing in this case. Subsection 1 of that provision reads:

> "In any case where reappointment is not recommended or where reduction of privileges is recommended the Executive Director shall notify the physician or dentist concerned and he shall be given an opportunity to appear before the Joint Conference Committee."

The by-laws, enacted and approved by the Hospital, are an integral part of the contractual relationship with appellant. See *Berberian v. Lancaster Osteopathic Hospital Association, Inc.*, 395 Pa. 257, 149 A.2d 456 (1959). But as we said previously, appellant's staff privileges have not been reduced in any way, nor has his reappointment been denied.

Based on the foregoing, we conclude that appellant Adler has not been deprived of any rights guaranteed by the Federal Constitution or the by-laws of the appellee Hospital. Our decision merely recognizes the difficulty and complexity of the task facing a large hospital attempting to provide comprehensive medical services. Many of the procedures which in the past were performed by a physician of the patient's choice must today be

handled by hospital-employed specialists. In light of such developments, the personal desires of persons such as Dr. Adler must yield to reasonable rules and regulations intended alike for the benefit of patients and their doctors, the university and its students, and the hospital and the public it serves. As we have held, the regulations here in question were in fact reasonable.

Decree affirmed. Costs on appellant.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Manderino joins.

Mr. Justice Nix concurs in the result.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

LAWRENCE N. ADLER, *Appellant* v. THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA	No. 52 March Term, 1972 Appeal from the Final Decree dated December 10, 1971 of the Court of Common Pleas, Civil Division of Allegheny County, Pennsylvania at No. 1501 July Term, 1970

DISSENTING OPINION

ROBERTS, J. FILED: July 2, 1973

The heart of this controversy, having been virtually ignored by the majority, as it was by the chancellor, compels my dissent. In my view, the superficial conclusions and adjudicative findings of the chancellor, relied upon by the majority, and based upon an avoidance of the true legal issue, lead unavoidably to an erroneous decree.

The determinative issue here is whether a public hospital may deny to the hospitalized patients of a qualified hospital staff cardiologist (see footnote 1, supra at page 3 of the majority opinion)[1] the use, by that cardiologist, of hospital facilities for performing cardiac catheterization diagnoses. The important corollary question involved is whether a public hospital may direct that only its salaried cardiologist shall be permitted to render this highly personalized medical service, to the exclusion

[1] From 1963 until 1969, appellant was the part-time director of the cardiovascular laboratory at Montefiore; as such, he performed *all* cardiac catheterizations at appellee hospital.

of other qualified cardiologists treating private paying patients who have selected their own staff privileged physician-cardiologist.

The majority holds, erroneously in my judgment, that Montefiore Hospital, a concededly public institution, may mandate that the diagnostically significant procedure of cardiac catheterization be performed *only* by its hospital employed cardiologist. This holding sanctions a practice of medicine more inclined to a hospital's cash flow and administrative convenience than to the proper delivery of medical services for hospital patients who have chosen to be under the care of a staff privileged physician of their own choice.

Even if one accepts the chancellor's findings as supported by the record, those findings neither necessitate nor warrant the broad and sweeping denial of privileges imposed upon appellant and the private patients he attends. Appellee's proof indicates that Montefiore Hospital, through its salaries full-time cardiologist, has performed, on the average, only one cardiac catheterization per week. In contrast to this figure, appellant, through uncontradicted testimony, established that his patient load (of which 50%-75% desire to be hospitalized at Montefiore) requires that he perform on the average of four to eight such procedures weekly.[2] In view of these statistics, appellee's refusal to allow Dr. Adler the use of the cardiac catheterization room, *at any and all times*, regardless of the fact that the facility will generally be unused, in my judgment, imposes upon a eminently qualified staff (cardiologist) physician a restriction that cannot withstand consitutional scrutiny.

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[2]The uncontradicted hearing testimony established that as of the date of the hearing, 39 patients (some acquired through referral) of Dr. Adler's were unable to be treated by appellant, due to the cessation of Dr. Adler's privileges to perform cardiovascular procedures at appellee-Hospital.

> As the majority correctly notes, it is by now unquestioned that: ". . . *the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth [and Fourteenth] Amendment[s]*, Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 800, 99 L.Ed. 1129 (concurring opinion); cf. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L. Ed. 131; Allgeyer v. State of Louisiana, 165 U.S. 578, 589-590, 17 S.Ct. 427, 431, 41 L.Ed. 832; Powell v. Commonwealth of Pennsylvania, 127 U.S. 678, 684, 8 S.Ct. 992, 995, 1257, 32 L.Ed. 253."

Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411 (1959) (emphasis added). "A state cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravenes the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware*, supra at 238-39, 77 S.Ct. at 756 (emphasis added).

Indeed, the very ". . .essence of the democratic faith is the equal claim of every man to pursue his facilities to the humanly fullest–for his own sake, but no less for the sake of society." Thomas, Felix Frankfurter, Scholar on The Bench 94 (1960).

Although the right to develop one's own talents and to pursue an occupation of choice exists, this right, as all others, is subject to reasonable regulation under appropriate circumstances. Although valid reasons may exist which auger in favor of the regulation of hospital facilities, the restrictions here imposed upon appellant, so vitally affecting not only his rights

but also those of the patients he treats, sweep too broadly in furthering appellee's purported purposes.

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of . . . [governmental] abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (1960) (footnotes omitted). "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314 (1964).

In the instant case, the Hospital's "drastic" restriction upon Dr. Adler's right to practice medicine is obviously "unduly harsh . . . [and] oppressive." *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649 (1919) (Brandeis, J., concurring). As a practical matter, appellee has denied appellant the right to *fully* practice his chosen occupation, an occupation which appellant is irrefutably well qualified to pursue.

> "It is common knowledge that a physician or surgeon who is not permitted to practice his profession in a hospital is as a practical matter denied the right to fully practice his profession. *In this day of advanced medical knowledge and advanced diagnostic techniques, much of what a physician or surgeon must do can only be performed in a hospital. In many instances only a hospital has the facilities necessary for proper diagnosis or treatment.*"

Wyatt v. Tahoe Forest Hospital District, 174 Cal.2d 709,___, 345 P.2d 93, 97,___Cal. Rptr.___,___(1959).

Clearly, "less drastic" means could have, and should have, been employed by appellee to insure that the interests of the students, patients and the hospital administration were accommodated. Here, the factual findings of the chancellor, approved by the majority, can be applied with equal conviction to any surgical hospital procedure, most of which involve a greater chance of death or other serious complication than does cardiac catheterization. (Appellee's own exhibit indicates that in a 1961 study, the mortality rate for cardiac catheterization was only .44%, with most deaths unattributable to the procedure itself, but rather to the severe illness of the patient. Cooperative Study on Cardiac Catheterization, Deaths Related To Cardiac Catheterization, III-17 (1968)). Yet Montefiore has not seen fit to close the doors of its surgical operating rooms to all but its "in-house" surgeons.

Obviously, "patient care" cannot be seriously suggested as the justification for Dr. Adler's total expulsion from the cardiac catheterization facilities of Montefiore Hospital. Appellee readily admits that Dr. Adler is fully qualified and competent to perform the procedures. See Note 1, supra.

As to appellee's contention that only one teaching hospital employed cardiologist can perform *all* catheterization procedures at Montefiore, there has been no allegation that appellant is not a fine teacher. In fact, the contrary appears to be true since appellant holds a clinical teaching appointment from the medical school. More importantly, however, is the fact that appellee has made no showing that every physician on the staff must be an integral part of the teaching program--there exists no just reason why appellant should not be allowed to make use of the cardiac catheterization laboratory at times when teaching

procedures are not under way. Obviously, this would result in no inconvenience to the medical school or the hospital. With Montefiore performing, on the average, only one catheterization per week, are there not times when teaching activities are not being performed in the cardiac catheterization laboratory? One must assume there are. "Under the guise of protecting the public interests [and those of the medical school] . . . [appellee has] impose[d] unusual and unnecessary restrictions upon [a] lawful . . . [occupation]." *Gambone v. Commonwealth*, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954) (Stern, C.J.). This it may not do, despite the majority's erroneous pronouncement to the contrary.

What the Hospital has done, and what the majority has today approved, is to open ". . . the door to a possible future situation wherein a municipal corporation could indirectly practice medicine by hiring its own doctors to operate a . . . [public] hospital . . ." *Benell v. City of Virginia* 250 Minn. 559, ___104 N.W.2d 633, 638 (1960) (Gallagher, J., dissenting). No greater infringement of the patient's right of privacy, to be treated by the physician of his or her choice, can be imagined. Cf. *Roe v. Wade*, ____U.S.___, 93 S.Ct. 705 (1973); *Doe v. Bolton*, ___U.S.___,___ 93 S.Ct. 739, 751 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 493, 85 S.Ct. 1678, 1686 (1965) (Goldberg, J., concurring). Under the majority holding, "[P]atients . . . [will be] denied the use [by their own physicians] of the Hospital's modern electronic and mechanical equipment . . . and materials readily available in this Hospital which operates on a large scale and has access to substantial public funds . . . "The physician and patient must forego the doctor-patient relationship so important to both of them." *Foster v. Mobile County Hospital Board*, 398 F.2d 227, 229 (5th Cir. 1968). See also *Griesman v. Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817 (1963).

Moreover, in addition to the curtailment of the rights of appellant's patients, he too has suffered an unlawful infringement upon his right to practice medicine. "The [majority sanctioned] refusal of access to ... [Montefiore] ... [has] the effect of denying to a licensed doctor qualified to practice ... [medicine] the right to fully exercise his profession." *Rosner v. Eden Township Hospital District*, 58 Cal.2d 592, 598, 375 P.2d 431, 434, 25 Cal. Rptr. 551, 554 (1962). On these issues the majority's error is indeed crucial.

Although Montefiore's actions in restricting the use of its cardiac catheterization facility may well prove profitable for the hospital (in that all patient payments for cardiac catheterizations will go to the hospital through its salaried full-time cardiologist), its action in denying to appellant, at all times, and under all circumstances, the right to perform cardiac catheterizations on appellant's *private hospitalized patients* is patently unlawful. The Hospital's exclusion of appellant from the cardiac facility broadly stifles appellant's right to practice medicine, when "less drastic" means are obviously available to appellee for the fulfillment of its lawful objectives. Montefiore, as well as the majority, has forgotten that "... the nature of a public hospital imposes an actual, although implied, limitation upon the authority of ... [the Hospital] to [drastically] restrict arbitrarily the use of the hospital by the public, whether physician or patient." *Alpert v. Board of Governors*, 286 App. Div. 542,___, 145 N.Y.S.2d 534, 538 (19).

> "Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. *But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the*

> *purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public.* They must recognize that their powers, . . . are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked . . . to preclude . . . [a doctor from treating his patients] not because of any lack of individual merit, but for a reason . . . not in furtherance of the common good.

Griesman, supra at___, 192 A.2d at 825 (emphasis added).

It must be emphasized again that:

> "[t]he question before the court in the instant case is an important one from the standpoint of the public. In many communities in this state there is only one hospital serving public and private patients alike. It, therefore, does not appear to me that a hospital commission, or hospital board, operating such a public hospital should be able by resolution to deprive the patient of the right to be attended by a doctor of medicine of his own choice, when such doctor is duly licensed and is admittedly a competent and qualified member of the medical staff of such a hospital."

Benell, supra at___, 104 N.W.2d at 640.[3]

I dissent.

Mr. Justice Manderino joins in this opinion.

[3]Recently, on May 8, 1973, this Court held in *Collins and Suburban Fair Housing, Inc. v. Mainline Board of Realtors*,___ Pa.___, ___ A.2d___(May 8, 1973), that a non-profit corporation (multiple listing service) could not impose stricter limitations on membership and *participation* in the multiple listing service than imposed by the Commonwealth in licensing real estate brokers. Obviously, the unlawful restraint-on-trade implications of *Main Line Board of Realtors*, although untouched by the majority here, have clear applicable relevancy to the proper resolution of the instant controversy.

Appendix B
30-a

The Supreme Court of Pennsylvania
Western District

PATRICK N BOLSINGER
PROTHONOTARY
[redacted]
DEPUTY PROTHONOTARY
SALLY MAYOS

PITTSBURGH, PA
15219

August 14, 1973

Paul H. Titus, Esq.
415 Oliver Building
Pittsburgh, Pa. 15222

Re: Adler v. The Montefiore Hospital
Association of Western Pennsylvania
No. 92 March Term, 1972

Dear Mr. Titus:

This is to advise you that the Court has entered the following Order on your petition for reargument in the above-captioned matter:

"August 13, 1973,

Petition Denied.

Per Curiam."

Very truly yours,

Sally Mayos

DEPUTY PROTHONOTARY

ad
cc: Robert Engel, Esq.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Civil Division

LAWRENCE N. ADLER,
Plaintiff

vs. No. 1501 July 1970

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, In Equity
Defendant

ORDER OF COURT

AND NOW to wit, this 28th day of May, 1970, after testimony on behalf of the Plaintiff, the Defendant having moved to dismiss Plaintiff's Motion for Preliminary Injunction and upon consideration of the testimony and the arguments of counsel, it is hereby ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion for a Preliminary Injunction be and the same is hereby denied and the Defendant is granted 20 days from the date of this Order to file an Answer to the Plaintiff's Complaint.

/s/ BY THE COURT
Bolte, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LAWRENCE N. ADLER,
Plaintiff

No. 1501 July Term, 1970

vs. In Equity

MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA,
Defendant

ADJUDICATION

BOLTE, J., Chancellor

STATEMENT OF ISSUES

This is an action in equity in which the plaintiff, a former employee of the defendant Hospital, seeks to compel the defendant to permit him to use those hospital laboratory facilities for his own personal use and profit which he had previously been employed to direct and operate for the benefit of the Hospital.

The plaintiff, Dr. Lawrence N. Adler (hereinafter referred to as "Adler") is a practicing cardiologist with offices in the Oakland area of Pittsburgh and in suburban Forest Hills, Pennsylvania. In addition to being on the Active Medical Staff at Montefiore Hospital (hereinafter referred to as "Montefiore"), Adler is a cardiac consultant on the staff at Homestead Hospital and is on the staffs of Presbyterian-University and Braddock General Hospitals.

In 1963, Adler was employed on a part-time basis as the salaried Director of Montefiore's Cardiac Catheterization Laboratory (hereinafter referred to as the "Laboratory") and continued in that employment until July 1, 1969, when he was replaced by Dr. Edward Curtiss, who was employed by Montefiore on a full-time basis as Director of the Laboratory. Adler does not contest Montefiore's right to discharge him as Director of the Laboratory, or its right to retain Dr. Curtiss as the full-time Director. (Stipulation, pars. 35,36).

Adler seeks in this action to compel Montefiore to permit him to use, in his private practice of cardiology and for his personal profit, the Hospital's extensive and expensive equipment, its employees and supplies and its Laboratory.

In December, 1969, almost six months after the termination of his employment, Adler made a formal request for a hearing before the Joint Conference Committee claiming that his staff privileges had been reduced (Plaintiff's Preliminary Hearing Exhibit 7). After considerable correspondence, Adler's counsel was notified by letter of April 9, 1970, that the Hospital did not deem a hearing appropriate before the Joint Conference Committee because it did not "regard that change of Dr. Adler's position as a 'reduction in his privileges', but rather a change in his employer-employee relationship" (Exhibit Q to Adler's Affidavit in support of motion for a Preliminary Injunction).

This suit then followed. After hearing in May, 1970, a preliminary injunction was denied. The matter is now before the Court for decision after a full hearing on the merits.

Testimony was taken at the preliminary and final hearings, and after final hearing the Chancellor makes the following

FINDINGS OF FACT

1. The plaintiff, Dr. Lawrence N. Adler, is a practicing cardiologist with offices in the Oakland area of Pittsburgh and in suburban Forest Hills, Pennsylvania. In addition to being on the Active Medical Staff at Montefiore Hospital, Adler is a cardiac consultant on the staff at Homestead Hospital and is on the staffs of Presbyterian-University and Braddock General Hospitals (Stipulation, pars. 3, 13, 20, 21).

2. Defendant, The Montefiore Hospital Association of Western Pennsylvania, is a nonprofit corporation organized and existing under the laws of the Commonwealth of Pennsylvania and operates The Montefiore Hospital at Fifth Avenue at Darragh Street, Pittsburgh, Allegheny County, Pennsylvania (Stipulation, par. 4).

3. Montefiore was originally organized in 1905 as a nonprofit corporation. The purpose of said corporation was then stated as follows:

> "Second: It shall be the purpose of this society to found, support and maintain a hospital and free dispensary for affording medical and surgical aid to the sick, injured and disabled."

A restatement of the Articles of Incorporation in their entirety was approved by Decree of the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 654 October Term, 1938, on August 23, 1938. The restated Articles of Incorporation set forth the purposes of the corporation as follows:

> "Second: The corporation is formed for the purpose of conducting and operating a hospital and dispensary; and in connection therewith carrying on such educational, philanthropic and scientific activities as are incidental to

hospital work, no discrimination to be made as to race, color or creed in the dispensing of its aid and service."

4. Since 1957, Montefiore Hospital has actively participated in the activities of the University of Pittsburgh School of Medicine. Montefiore, on December 11, 1969, entered into an Agreement of Affiliation with the University of Pittsburgh, under which Montefiore became affiliated with the Schools of Medicine, Dental Medicine, Nursing, Health-Related Professions and Pharmacy and the Graduate School of Public Health of the University of Pittsburgh, a state-related university, receiving funds from the United States government and from the Commonwealth of Pennsylvania. On December 11, 1969, Montefiore also became a formal corporate member of the University Health Center (Stipulation, par. 8; Stipulation Exhibit 2).

5. Montefiore is presently organized on a departmental basis, each department having its own full-time chief. There are five (5) departments designated as Medicine, Surgery, Radiology, Anesthesiology and Pathology. According to the By-Laws, Rules and Regulations of the Medical Staff of Montefiore Hospital, the respective departmental chief has the responsibility for and the authority over the administration, organization and conduct of all departmental activities throughout the Hospital. The Division of Cardiology and its Laboratory are within the Department of Medicine (Transcript of Final Hearing, Vol. 1, pp. 196-197; Defendant's Final Hearing Exhibit B; Stipulation Exhibit 3).

6. From July 16, 1963, until July 1, 1969, Montefiore employed Adler on a part-time basis as the salaried Director of the Cardiac Catheterization Laboratory. According to the memorandum from Irwin Goldberg to Adler, dated July 20, 1963 (Stipulation Exhibit 4; Plaintiff's Preliminary Hearing,

Exhibit 2), Adler was employed to establish, organize and activate cardiac catheterization and such other procedures as may be agreed upon (Stipulation, par. 11).

7. Contemporaneously with his employment by Montefiore, Adler was given a temporary appointment as a Junior Assistant on the Active Medical Staff of the Department of Medicine of Montefiore Hospital. In December, 1963, Adler was appointed as a Junior Assistant on the Active Medical Staff of the Department of Medicine for the year 1964. Thereafter, Adler was promoted to Senior Assistant on the Active Medical Staff of the Department of Medicine for the year 1965 and has continued in that capacity.

Adler was given written notice of said appointments for the years 1964 through 1968, and for 1970 was advised orally, along with all other physicians on Montefiore's staff, that his staff appointment was continued and that the absence of written notification for the year 1969 did not alter or diminish his status as a Senior Assistant on the Active Medical Staff of the Department of Medicine (Stipulation, par. 13; Stipulation Exhibits 5 & 6).

8. From July 16, 1963, to July 1, 1969, the date when Adler was terminated as Director of the Laboratory, Adler's relationship with Montefiore was of a two-fold status. First, Adler as Director of the Laboratory was a part-time employee performing cardiac catheterizations and related procedures and administering the affairs of the Laboratory. Second, Adler was a cardiologist engaged in private practice on Montefiore's Active Medical Staff with all the privileges attendant thereto (Transcript of Preliminary Hearing, p. 79). However, it was understood that his employment as Director of the Laboratory and the payment therefor were not to be for or involved with his

privileges or private practice as a Staff Physician (Goldberg Deposition, pp. 43, 44; Plaintiff's Preliminary Hearing, Exhibit 2).

9. Cardiac Catheterization involves the threading of a catheter through a patient's vein or artery into the heart in order to measure pressures. The placement of the catheter into the heart is done under fluoroscopic or image amplification control. Cineangiography is usually combined with catheterization and consists of injecting a contrast substance or material into an artery or cardiac chamber for the purpose of defining its anatomy and detecting organic difficulties. When the contrast material is injected, the image is recorded on x-ray movies or single x-ray film.

Coronary arteriography is usually combined with left heart catheterization and involves the placement of a catheter into an artery, the injection of contrast material through the catheter, and the attempt to detect abnormal arterial conditions or deterioration (Memorandum of Dr. Edward Curtiss, dated February 22, 1971).

10. Cardiac catheterizations and related procedures are essentially team functions which are complicated procedures and require other personnel, usually technicians or nurses, besides the physician actually performing the procedures (Ross Report; Transcript of Final Hearing, Vol. 1, pp. 84, 132, 144).

11. The risks of potential complications from these procedures are varied, all stemming from the invasion of a foreign body into the circulatory system, manipulation and the effect of the generalized procedure upon the patient. All doctors do not agree on the magnitude of the risks, but all agree that considerable risk is involved (Transcript of Final Hearing, Vol. 1, pp. 30, 293, 298, 299; Defendant's Final Hearing Exhibits 6, H).

12. The major complications following cardiac catheterizations and related procedures are divided into the following major groups: (1) death, (2) serious arrythmias, (3) profound hypotension, (4) complications involving the arterial system, (5) accidental perforation of the heart, (6) catheter problems, (7) serious infections, (8) serious allergic reactions, (9) embolism, (10) cardiac complications, and (11) serious bleeding (Defendant's Final Hearing Exhibit 6).

13. These and other less serious complications can arise in many instances without warning and after the study has been completed (Defendant's Final Hearing Exhibits G, H; pp. 53-56; Transcript of Final Hearing, Vol. 1, pp. 292, 298, 299).

14. There is the need for monitoring the close observation for several hours after the conclusion of the procedure (Defendant's Final Hearing, Exhibit G, p. 290).

15. As Director of the Laboratory, Adler performed left and right heart catheterizations, coronary arteriograms, angiocardiograms, aortograms and installed temporary and permanent pacemakers in the Laboratory (Stipulation, par. 14). With the exception of cardioversions (which were also performed by other cardiologists in the Coronary Care Unit and at the patient's bedside), and the installation of temporary and permanent pacemakers, all of the procedures performed in the Laboratory at Montefiore are diagnostic in nature (Stipulation, par. 16; Transcript of Preliminary Hearing, p. 119).

16. When Adler was first employed by Montefiore it was Mr. Goldberg's understanding that the performance of procedures in the Laboratory would be limited to Adler as Director of Laboratory (Goldberg Deposition, pp. 64-70).

17. Except in cases of emergency, Adler, as Director of the Laboratory, was the only cardiologist who performed

cardiac catheterizations and related procedures both on his own patients and on patients referred by other physicians to him (Stipulation, pars. 17, 30).

18. This policy of limiting the performance of cardiac catheterizations and related procedures in the Laboratory to the salaried part-time Director was established and maintained even though there were four other cardiologists on the staff of Montefiore Hospital who could perform many of these procedures (Troen Deposition, pp. 28, 29, 49, 50; Transcript of Final Hearing, Vol. 1, pp. 147, 152, 156, 158).

19. In January 1967, Adler discussed the policy of limiting the performance of procedures to the Director of the Laboratory with Dr. Troen and apparently left Dr. Troen with the distinct impression that he favored limiting the Laboratory to the Director. At that time, Dr. Albert Treger, a qualified cardiologist with experience in cardiac catheterization work, was appointed to the staff of Montefiore. Dr. Julian Levinson, with whom Dr. Treger was associated, orally requested permission from Dr. Troen that Dr. Treger be permitted to perform cardiac catheterization procedures in the Laboratory. Dr. Troen was aware at that point that only Adler had been performing procedures in the Laboratory, and, therefore, he spoke to Adler concerning the request.

Although the precise language of the discussion differs, it was concluded that the number of physicians functioning in the Laboratory should be kept to a minimum and in Laboratories such as at Montefiore Hospital, where the volume of procedures was sufficiently low, that number should be one. Adler expressed the feeling that it was in everyone's best interest that only he continue to perform procedures in the Laboratory (Troen Deposition, pp. 27, 31; Transcript of Final Hearing, Vol. 8, pp. 223, 235-238). Adler's recollection was that after the discussion

Dr. Troen said that Dr. Treger would not be using the Laboratory (Preliminary Hearing p. 125).

20. Dr. Troen also learned that the performance of these procedures in other university teaching hospitals was limited to the Director. Dr. Levinson was then informed by Dr. Troen that Montefiore had an established policy limiting the performance of cardiac catheterization procedures to the Director of the Laboratory. Dr. Treger's request was denied (Stipulation, par. 24, Transcript of Final Hearing, Vol. 1, pp. 223, 224, 235).

21. While employed as Director of the Laboratory, Adler also established the policy that for the welfare of the patient, a thoracic surgeon would participate in the installation of permanent pacemakers. The installation of a permanent pacemaker, which is a therapeutic device designed to normalize and stabilize the action and rhythm of the heart, has never been carried out alone by a thoracic surgeon, but only in conjunction with the Director in the Laboratory. In fact, the surgeons, when assisting in these installations, do not introduce or manipulate the catheter into the artery or heart. The surgeons merely perform the surgical functions of making the incision and implanting the battery pack in the chest wall. These are not cardiological procedures (Troen Deposition, pp. 39-40, 48; Adler Deposition, pp. 52, 53; Transcript of Preliminary Hearing, pp. 164, 166-167; Transcript of Final Hearing, Col. 1, pp. 117, 126, 136; Stipulation, par. 28).

22. While the Laboratory was being organized and developed, other parallel developments were evolving which culminated in Montefiore's becoming an equal partner with the Presbyterian-University Hospital in the clinical training of undergraduate medical students, interns, residents and fellows for the University of Pittsburgh School of Medicine (Plaintiff's

Final Hearing, Exhibit 4; Transcript of Final Hearing, Vol. 1, pp. 215-217; Transcript of Final Hearing, Vol. 2, p. 249; Stipulation, Exhibit 2; Defendant's Final Hearing, Exhibit I).

23. At about the time Mr. Goldberg became Executive Director in 1961, the Board of Trustees decided to go ahead with the plans to triple the size of the Hospital in order to deliver the programs of a teaching hospital. The plans adopted by the Board called for a tripling of the overall size of the Hospital even though the number of beds was to increase only 60% (Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

24. Since sufficient resources were not available to the Hospital, the Board, rather than abandon its plans for a teaching hospital, decided that it would carry out the capital expansion program in phases. Each stage represented the construction of a specific number of beds, increased or new support facilities to serve the beds, medical research facilities and the like (Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

25. The growth of the physical plant was designed from the Board's point of view to provide for optimal patient care and teaching facilities in light of new concepts that had emerged in the United States in the 1940's and 1950's. In the decade or so before Montefiore began its expansion, the concept that optimal patient care, all things being equal, could best be provided in an advanced university-affiliated teaching hospital received strong support in various areas of the country. In this type hospital there were medical students, interns, residents and fellows being taught and clinical investigations being performed all under the leadership and direction of a full-time cadre of physicians.

Added to and complimenting the cadre of full-time physicians are the activities of the attending medical staff both

in patient care and teaching (Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

26. In the early 1960's, the physicians of the Department of Medicine and its voluntary leadership requested that the Board seek full-time medical leadership, because this was a way in which progressive programs in teaching hospitals could be carried out. The Department of Surgery at Montefiore also requested full-time leadership at approximately the same time (Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

27. Paralleling this expansion of physical facilities was the expansion of the Hospital's teaching program and the recruitment of full-time physicians and surgeons to aid and improve the patient care, teaching and research programs. In this connection, in 1957, Montefiore Hospital began the teaching of undergraduate medical students in addition to the interns and residents whom it had been training. The training of undergraduate students began under the aegis of Dr. Jay Silverberg, an attending physician, who was then serving as Chairman of the Department of Medicine at Montefiore Hospital on an elective rotational basis (Transcript of Final Hearing, Vol. 1, pp. 208-212, 215-217; Vol. 2, pp. 215-217, 236-266).

28. Consequently, Mr. Goldberg, the Executive Director, at the direction of the Board, and with the aid of many of the attending physicians and surgeons, began the search for full-time leadership in these departments. Hospitals were visited in many states. Mr. Goldberg also made inquiries of colleagues at national meetings, with the assistance and direction of Dr. Jack Meyers, then Physician-in-Chief of Presbyterian University Hospital and Chairman of the Department of Medicine of the University of Pittsburgh School of Medicine (Transcript of Final Hearing, Vol. 2, pp. 215-217-236-266).

29. Ultimately, Dr. Philip Troen, who was then at Beth Israel Hospital in Boston and on the faculty at Harvard Medical School, was established as a candidate. Dr. Troen visited the Hospital, met various influential members of the staff, and presented a paper and discussion before the staff. He also met with Dr. Meyers to determine the proper integration of Montefiore's Department of Medicine into the Medical School's Department of Medicine (Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

30. Upon recommendation to the Board by the Medical Staff, which included approval by the Medical Executive Committee, Dr. Troen was appointed as Physician-in-Chief of Montefiore Hospital's Department of Medicine in 1964 (Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

31. To effect the transition to full-time leadership, the Rules and Regulations of the Medical Staff were amended. The Medical Staff, through its Medical Executive Committee, recommended changes placing the leadership in the full-time departmental chiefs. These changes, partially expressed in Article V, Section 1, of the By-Laws, Rules and Regulations of the Medical Staff were approved by the Board of Montefiore in 1964 (Defendant's Final Hearing, Exhibit B). Article V, Section 1, of the amended By-Laws provided as follows:

ARTICLE V

Departments

Section 1. Departments

All clinical, research and teaching activites of the hospital will be divided among the following departments: Medicine, Surgery, Pathology, Radiology, and Anesthesiology. The Chiefs of these departments will be designated

as follows: Physician-in-Chief, Surgeon-in-Chief, Pathologist-in-Chief, Radiologist-in-Chief, and Anesthesiologist-in-Chief.

The respective departmental Chief shall have the responsibility for and the authority over the administration, organization and conduct of all his departmental activities throughout the hospital including the areas of patient care, teaching, research and post-graduate education. All appointments, promotions, and deletions, as well as appointments to house staff within the department shall require his approval. The specialty divisions in medicine and surgery may be organized to provide specialty outpatient services and ward patient consultation and clinical services.

Until such time as full-time departmental leadership exists, the respective department will elect by secret ballot without nomination two senior attending physicians for the position of departmental Chief and the two senior or associate physicians for the position of assistant departmental Chief and transmit these names with the vote through the Executive Director of the hospital to the Executive Management Committee. The Executive Management Committee of the Board shall then appoint one of the former as Chief and one of the latter as Assistant Chief. In the event that the departmental Chief is not full-time, his term of office shall be three years and he may succeed himself after a lapse of three years.

(Transcript of Final Hearing, Vol. 2, pp. 215-217, 236-266).

32. Following Dr. Troen's arrival in February, 1964, Montefiore became operationally integrated with the University Medical School. Montefiore became one of the clinical arms of the Medical School's Department of Medicine for the training of

students, interns and residents, although full affiliation with the Medical School did not come until December, 1969 (Transcript of Final Hearing, Vol. 2, pp. 88, 89, 141; Plaintiff's Final Hearing, Exhibit 4).

33. From 1962 to the present students per year rotating through the Hospital rose from 10 to 110.

Interns and resident staffs increased from 14 to 40 during the present year. There are also 7 clinical Fellows at present, whereas there were none in 1963 or 1964.

In addition, currently about 45% of the students at the University of Pittsburgh School of Medicine receive their training in internal medicine at Montefiore Hospital compared to a relatively small percentage seven years ago (Transcript of Final Hearing, Vol. 1, pp. 199-213).

34. Montefiore has been following the route that many other university-affiliated, advanced teaching hospitals have traversed, and that is in the direction of providing full-time leadership. Indeed, one of the purposes of Dr. Troen's appointment was to provide such full-time leadership and to recruit a cadre of full-time physicians, now numbering 11, with three additional appointments becoming effective in the spring and summer of 1971 (Transcript of Final Hearing, Vol. 1, pp. 199-213).

35. The full-time physicians have responsibilities for patient care, teaching and clinical investigation in the various sub-specialty areas of the Department of Medicine, among which are cardiology, gastroenterology, hematology (Transcript of Final Hearing, Vol. 1, p. 201). Full-time physicians in an advanced teaching hospital avoid or reduce conflicts of the various outside commitments of the attending physicians.

36. The salaried full-time physician does not have the rigorous demands of serving patients at several different places and at fixed times. Although the full-time physician also has rigorous and time-consuming demands, these demands are centered only in the Hospital he serves. The full-time physician has the ability, motivation and commitment to be in the Hospital and devote in depth, detailed time to teaching, patient care and clinical investigation.

The full-time physician is paid his salary by the hospital and/or medical school for being on the scene, for being readily available for consultations with attending physicians and students at every hour and for lending his expertise, motivation, teaching abilities and entire scope of activities to the patients and students. The income of the full-time physician is not dependent, as is that of the attending physicians, upon the numbers of patients he can see (Transcript of Final Hearing, Vol. 1, pp. 289-292).

37. Throughout the United States, and at Montefiore, the system of full-time leadership is essentially predicated upon the development of full-time leadership and activity in the specialty laboratories (Transcript of Final Hearing, Vol. 1, p. 213).

38. When Dr. Troen arrived at Montefiore in 1964 there were 8 divisions or subspecialty areas within the Department of Medicine. At the present time almost all of the divisions have unit heads who are full-time physicians. There are, however, some divisions, such as cardiology, for which full-time heads are still being sought. The following is a list of the units and their respective full-time heads:

Renal or Kidney Unit - Dr. Sheldon Adler
Gastroenterology Unit - Dr. Siamak Adibi
Special Hematology - Dr. Marvin Lewis
Adrenal Unit - Dr. Richard Vagnucci

Thyroid and Nuclear Medicine Unit - Dr. Gilbert Isaacs
Clinical Immunology - Dr. Alan Winkelstein
Blood Bank - Dr. Richard Shadduck
Ambulatory Services - Dr. David Segal
Radioimmunoassay & Cytogenics - Dr. Howard Nankin
Cardiac Catheterization Laboratory - Dr. Edward Curtiss.

(Transcript of Final Hearing, Vol. 1, pp. 250, 251).

39. Formerly, these laboratories or units were directed and under the control of part-time salaried physicians who were employed by the Hospital. These physicians, employed on a part-time basis, were also, in another capacity, members of the attending medical staff with all the privilege incident thereto (Transcript of Final Hearing, Vol. 1, p. 251). When these part-time physicians were replaced, they were no longer permitted to perform the specialized procedures in these units though they were fully qualified (Transcript of Final Hearing, Vol. 1, pp. 213-216).

40. The provision of full-time leadership for the specialty activities reflects the deep commitment of the Board of Trustees toward the evolution of Montefiore into an advanced teaching hospital. The Board approves the appointments of these full-time physicians. The Board also provides the financial resources to pay their salaries and provides funds for clinical research (Transcript of Final Hearing, Vol. 1, p. 211; By-Laws, Rules and Regulations of the Medical Staff of Montefiore Hospital, Article III, Sections III and IV; Defendant's Final Hearing Exhibit B).

41. In April, 1969, Montefiore informed Adler that his part-time employment as Director of the Laboratory would be terminated as of July 1, 1969 (Stipulation, par. 31).

42. On July 1, 1969, Adler's employment as part-time

Director of the Laboratory was terminated and Dr. Edward Curtiss was employed by Montefiore on a full-time basis as Director of the Laboratory (Stipulation, par. 32).

43. Montefiore had the right to employ a full-time cardiologist as Director of the Laboratory to perform procedures in said Laboratory (Stipulation, par. 35).

44. Montefiore had the right to discharge Adler as an employee (Stipulation, par. 36).

45. Adler served as Chief of the Coronary Care Unit from July 1, 1969, the date of his discharge as Director of the Laboratory, until March 1, 1970, when he was relieved of this position. Reasons given for his discharge were his failure to follow or accept the system utilized in the Unit, attempting to subvert the system by performing procedures in unauthorized places and at unauthorized times, failure to conduct the required teaching courses, and removing from hospital premises and failure to return after reasonable requests three expensive items of medical equipment (Defendant's Final Hearing, Exhibits C, D, F). No question concerning this discharge is involved in this proceeding.

46. From July 1, 1969, to the present (with the exception of the installation of temporary pacemakers which was permitted by virtue of his employment in the Coronary Care Unit), Adler has not been permitted to perform any of the procedures which he had theretofore performed as Director of the Laboratory of Montefiore (Stipulation, par. 33).

47. Since July 1, 1969, Montefiore Hospital has continued the established policy and practice started during Adler's time as Director of the Laboratory, that all Laboratory procedures, including catheterizations, would be performed by the full-time Director of the Laboratory, except (1) in case of

emergency; and (2) that the salaried physicians employed by Montefiore to be in charge of the Coronary Care Unit on a rotating monthly basis could insert temporary pacemakers and perform cardioversions on patients in the Unit only during the months the individual physician is in charge of the Coronary Care Unit (Stipulation, par. 37). However, this latter exception is no longer applicable since Dr. Varat's arrival as full-time Chief of the Coronary Care Unit. Now, only he may insert this emergency type equipment in patients located in the Unit, with Dr. Curtiss, the present full-time Director presently relieving Dr. Varat when he is unavailable.

48. The Board of Trustees of Montefiore Hospital, by and through its delegates, has determined that optimum patient care, teaching, clinical investigation and more efficient administration in the Laboratory will be promoted and achieved by permitting only the cardiologist employed on a full-time basis as Director of the Laboratory to perform procedures therein. This method of operation is utilized by most of the major university teaching hospitals. This same determination was used to exclude all other cardiologists but Adler from utilizing the Laboratory, while Adler was employed by Montefiore Hospital on a part-time basis as Laboratory Director.

49. Many of the major university-affiliated teaching hospitals limit the performance of procedures in their cardiac catheterization laboratories to full-time physicians to the exclusion of qualified part-time or attending physicians (Reports of Ross, Scheidt, Shaver and Leonard; Transcript of Final Hearing, Vol. 2, p. 75).

50. Limiting the performance of procedures to the full-time Director of the Laboratory, improves patient care, the teaching program, and promotes more efficient administration in the following ways:

Appendix D
50-a

1. Cardiac catheterization and related procedures are team functions which require routinization and familiarization on the part of all members and physicians performing the procedures, as well as an intimate familiarity with the workings of the equipment and the methods in which each physician utilizes the equipment (Report of Ross and Scheidt; Transcript of Final Hearing, Vol. 1, pp. 84, 132, 144, 238-9, 346-8).

2. Full-time presence on the hospital premises permits optimal treatment of the complications which arise during and frequently after the procedures are completed because of the ready availability of the physician who performed the procedure.

3. Maintenance of competence is achieved by performing a maximum of three cardiac catheterizations per week, and in order to maintain that competence the procedures should be concentrated in one physician, preferably full-time, in order to guarantee his competence in a low volume laboratory, like that at Montefiore Hospital which has averaged barely one procedure per week since the Laboratory has been established (Reports of Gorlin and Medearis, Scheidt; Transcript of Final Hearing, Vol. 1, pp. 38, 234-237, 273, 274; Vol. 2, pp. 372-376; Defendant's Final Hearing; Exhibits A and K; Plaintiff's Final Hearing Exhibit 2; Plaintiff's Preliminary Hearing Exhibits 4 and 5).

4. The presence of a full-time physician whose commitment is to teaching and to be on the premises permits him to take the extra time necessary before, during and after the procedures to more effectively teach the scores of medical students, interns and residents and Fellows who are invited to the Laboratory and utilize it as a basic

learning experience (Reports of Leonard, Medearis, Scheidt, Kurland; Transcript of Final Hearing, Vol. 1, pp. 120-126, 271-274; Vol. 2, pp. 8, 9).

5. Procedures can be more effectively scheduled to fit the availability of one full-time physician rather than a number of busy practitioners with outside commitments.

6. These procedures should be scheduled in the morning hours so that the full-time physician who performed the procedure will be on the premises later in the day if complications arise (Transcript of Final Hearing, Vol. 1, pp. 241, 242).

7. Limiting the procedures to a full-time director insures that a physician will perform the important non-professional but essential administrative details of operating a laboratory. In a low volume laboratory such as that at Montefiore Hospital, it would be difficult to obtain a qualified cardiologist to assume all of these administrative details if his volume were further reduced by permitting private physicians to perform procedures (Transcript of Final Hearing, Vol. 1, pp. 151, 152; Vol. 2, pp. 93, 94).

8. Utilization of the sensitive and expensive diagnostic equipment by more than one physician presents more problems with breakdowns and lack of reliability (Transcript of Final Hearing, Vol. 1, pp. 281-283; Reports of Shaver and Scheidt; Defendant's Final Hearing, Exhibit M).

9. Montefiore Hospital has a substantial and legitimate interest in insuring the optimal operation of the technicians and nurses who constitute the team and the optimal operation of the equipment since it could be liable

for damages if any of these integral parts happen to cause injury.

51. Adler has not been deprived of any privileges which are incidental to or are possessed by any other cardiologist on the Montefiore Medical Staff and which are necessary to effectively treat his patients (Transcript of Final Hearing, Vol. 1, pp. 255, 256; Troen Deposition, pp. 85, 86).

52. Adler waited eight months before requesting any hearing before the Joint Conference Committee of the Hospital (Plaintiff's Preliminary Hearing Exhibits 6, 7, 8).

53. The Joint Conference Committee of Montefiore is not required to grant a hearing for termination of employment.

54. Adler accepted alternative employment as Director of Montefiore's Coronary Care Unit upon termination of his Directorship of the Laboratory (Stipulation, par. 31).

55. Adler did not question his inability to perform procedures in the Laboratory until well after his employment as Director of the Coronary Care Unit was in jeopardy (Defendant's Final Hearing Exhibits C, D, E).

QUESTIONS OF LAW

The following questions of law are raised by the facts for the Chancellor's determination:

(a) Whether the Hospital Regulations restricting the performance of procedures in the Cardiovascular Laboratory to "Full-Time" physicians (a) violate the Due Process Clause and/or (b) the Equal Protection Clause.

(b) Whether the defendant hospital by denying plaintiff doctor privileges in the Cardiovascular Laboratory violated due process in refusing plaintiff a hearing.

(c) Whether defendant hospital violated any contractual, or other legal rights of plaintiff.

(d) Whether the policy of the hospital violates the patient-physician relation.

DISCUSSION

Plaintiff's constitutional rights were not violated.

By reason of its affiliation with the University of Pittsburgh's Medical School, a state-related university, and the financial support received from the Commonwealth of Pennsylvania, Montefiore has conceded that it is a public institution and its conduct and actions are "state actions". Thus, Montefiore's actions and policies fall within the scope and limitations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment (Stipulation, par. 9).

A review of the applicable law and the overwhelming weight of the evidence in this case, make it clear that Montefiore's policy of limiting the performance of procedures in its Laboratory to the Director of the Laboratory (except in limited situations heretofore mentioned), is neither arbitrary nor capricious, nor, as plaintiff suggests, fraudulent or conspiratorial (See *Gambone v. Commonwealth*, 375 Pa. 547 (1954)).

The wisdom of regulatory legislation is not within the province of this Court. The Fourteenth Amendment is not utilized by the courts to invalidate state acts because the court deems said acts to be unwise or to be incompatible with their own social or economic beliefs. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1029 (1963). Although the Supreme Court of Pennsylvania has indicated in *Pennsylvania State Board of Pharmacy v. Pastor*, 441 Pa. 186 (1971) such legislation shall be more closely scrutinized by our courts than by the United

States Supreme Court, there is no indication that even under such strict interpretation a court can or should substitute its judgment for that of the body which creates the regulation. The basic tests for determining the validity of legislation still remain: is it arbitrary, can a less restrictive means be used, and whether there is a rational connection between the regulation and the interest which is sought to be protected.[1] An examination of the facts based on these principles leaves no doubt but that the regulation is reasonable, proper and necessary to effectuate the basic interests of the hospital and is not violative of any constitutional rights of the plaintiff. The hospital had a choice of remaining as a community hospital, or affiliating itself with the University so as to become an integral part of the University Health Center. In its judgment the best interests of the community, the patient and the hospital would be served by so doing. Although some physicians may disagree[2] with such an approach, the experience of many university-affiliated hospitals points to the wisdom of such an approach. The fact that all hospitals utilizing this approach do not treat all Department Heads on the same basis does not prevent Montefiore from taking the approach which in its judgment will best serve its interests.

Diligent research by plaintiff's most able counsel has revealed no case which supports his contention that due process has been violated. Although the cited cases range from *Dr. Bonhams Case*, 77 Eng. Rep. 647 (C.B. 1610) to *Apetheker v.*

[1]The three tests for determining whether a regulation or statute violates the Due Process Clause have been followed by the Pennsylvania Supreme Court. See *Gambone v. Commonwealth*, 375 Pa. 547 (1954). This case cited in *Pastor case*, supra.

[2]"Is Your Hospital Trying to go Big Time? Stop It! ", *Medical Economics*, April 26, 1971.

Secretary of State, 378 U.S. 500 (1964) and the presently existing "socialized" medicine statute in England (23 Halisbury's Statutes of England, 1970, 3rd), all cases cited relate to depriving a physician of the right to practice. None of the cited cases raise the question of the right to terminate an employment relationship which, in essence is the primary issue in this case, and which, does not require a hearing for termination, absent an applicable contractual or employment statute, neither of which exists here (Stipulation 36).

On the contrary, it is well established that a hospital has the right to govern the use of its facilities and the practice of medicine under reasonable rules and regulations *(American Jurisprudence*, 2d, Vol. 40, Sec. 8, Hospitals).

The Fourteenth Amendment does not censure a state for allowing privileges to one group of persons while declining them to others, where the regulation or policy has a reasonable purpose and embodies a reasonable means of achieving that purpose. *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101 (1961).

As stated tersely by Chief Justice Warren in McGowan, supra:

> "...A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comrs.*, 330 U.S. 552, 91 L.Ed. 1093, 67 S.Ct. 910; *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 79 L.Ed. 1070, 55 S.Ct. 538; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337, Ann Gas 1912c 160; *Atchison, T. & S.F.R. Co. v. Matthews*, 174 U.S. 96, 43 L.Ed. 909, 19 S.Ct. 609, (366 U.S. 425, 425).

In *Fleming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367 (1960), the Supreme Court stated:

> "...we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 611.

Again, more recently, the Supreme Court in *Dandridge v. Williams*, 397 U.S. 471, 485, 486, 90 S.Ct. 1153 (1970) stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' .... 'The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific' .... 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it' ...."

Illustrations supporting these general principles are *Martin v. Walton*, 368 U.S. 25 (1961) (Missouri attorney refused permission to practice in Kansas) and *Hayman v. City of Galveston*, 273 U.S. 414 (1927) (Osteopathy prohibited from practicing in a city hospital).

More directly on point is *Benell v. City of Virginia*, 250 Minn. 559, 104 N.W. 2d 633, affirming a hospital's right to regulate a radiology department. There, as here, the physician was permitted to examine and treat his patients. Here Dr. Adler still retains all privileges of other cardiologists on the staff. Plaintiff contends that the Benell case is distinguishable because the American College of Radiologists advocates such an approach and the physician is not denied the right to treat the patient. But this contention overlooks the fact that many distin-

guished physicians at least comparable to the College of Radiology do support the "full-time" director concept, and that cardiovascular procedures are principally diagnostic not treating procedures (Stipulation 16). Plaintiff is still free to "treat" his patients after the diagnosis is completed.

Other jurisdictions have reached the same conclusions with respect to radiology departments: *Blank v. Palo Alto-Stanford Hospital Center*, 234 Cal. App. 2d 377 (1965); *Letsch v. Northern San Diego Hospital*, 55 Cal. Rptr. 118 (1966), *Greisman v. Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817 (1963) (Osteopath).

Examples of arbitrary exclusionary hospital regulations are found in *Greisman*, supra, where a hospital board refused to consider any osteopathic applicants; *Ware v. Benedict*, 225 Ark. 185, (a physician's application turned down twelve times without specifying any reason); *Findlay v. Board of Supervisors*, 72 Ariz. 58 (1951), vague regulations; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (occupation denied to Chinese); *Skinner v. Oklahoma*, 316 U.S. 535 (1942), (sterilization of only some convicts convicted of similar crimes); *Sams v. Ohio Valley General Hospital*, 413 F.2d 826 (4th Cir. 1969) (physicians without County offices denied staff privileges; *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968) (By-Laws requiring membership in medical society stricken); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), (struck down a New Mexico rule that past character indiscretions not involving moral character could bar admission to the Bar because it could not affect applicant's present fitness.

It is not within the province of this Court to determine what might ultimately be found to be the ideal situation for patients, or doctors or the community. The sole question for the Court is whether the Hospital in the exercise of its discretion established a full-time director in a reasonable manner and

mode. The Chancellor finds that the evidence supports the action of the hospital as justifiable in view of the ends to be accomplished. It was Montefiore's judgment that the present method of operating its Laboratory was in the best interest of the public and the hospital in that it would promote better patient care, higher standards of practice, a better teaching program and more efficient hospital administration than any other alternative method of operation. This method of operation presently restricts the performance of procedures in the Laboratory to the Director of the Laboratory and his team. It is the same method of operation under which Adler organized and administered the Laboratory from July, 1963, until July, 1969. It is also the same method of operation which Adler indicated as the better to Dr. Troen in 1967 when a request was made to Dr. Troen for permission for Dr. Treger to perform procedures in the Laboratory.

This policy is not violative of due process nor equal protection rights of the plaintiff.

Nor does the Chancellor find any impropriety in the failure of the hospital to grant plaintiff a hearing before the Joint-Conference Committee as required by the Staff By-Laws in certain cases. The Constitutional provision requiring that a person cannot be deprived of a right without a fair hearing is a fundamental precept of Anglo-American jurisprudence. Summary dismissal without the opportunity to be heard violates due process of law. (*Slochower v. Board of Education*, 350 U.S. 551 (1956); *Goldberg v. Kelly*, 397 U.S. 254 (1970). This principle has been extended to denial of physicians privileges in a hospital under certain circumstances. *Meredith v. Allen County War Memorial Hospital*, 397 F.2d 33 (6th Cir. 1968); *Citta v. Delaware Valley Hospital*, 313 F.Supp. 301, (E.D. Pa. 1970). All these cases, however, involve the termination of rights which an individual had or was entitled to. Here the evidence does not

disclose to the satisfaction of this Court that plaintiff Adler was deprived of any privileges as a staff physician. The right to perform procedures in the Cardio-Vascular Laboratory existed because of his employment as a part-time director of the laboratory, not because of his staff privileges. Adler does not question his termination as an employee. Also, there are no statutory rights or benefits of which Adler has been deprived. Never has the right or privilege to perform these procedures been extended to a physician who is a member of the Active Medical Staff because of staff membership. Therefore, Adler has not been deprived of any privileges or rights; nor have any rights or privileges been denied to him which he formerly possessed by virtue of his staff status. It was only as a result of his prior status as an employee that he enjoyed the rights he now seeks.

Adler has not been foreclosed from practicing as a physician or as a staff member at Montefiore. Adler has not been deprived of anything which he or any other physician on the Active Medical Staff at Montefiore, or the other major university teaching hospitals in the country, or indeed even the major unaffiliated hospitals in Pittsburgh have been permitted to do as a result of their staff membership or privileges incident thereto.

Adler has not been foreclosed from seeking to perform these procedures at other hospitals because of any personal stigma or reasons which could be attributed to his personal qualifications and which were caused by Montefiore's refusal to permit him to perform procedures.

Moreover, Adler could not and did not prove that he has been harmed in any manner. The performance of these procedures is but a very small part of the total practice of cardiology. Adler, as previously recounted, has retained each and every privilege and right incident to and necessary for the admission,

care and treatment of his patients and those patients referred to him.

Additionally, this policy or regulation established, maintained and continued by Montefiore, does not question Adler's professional qualifications or competence. It does not and has not been discriminatory. It is applied evenly and equally across the cardiovascular services. The policy was established, maintained and continued in a fair manner, after due deliberation and, in fact, encouraged by Adler. The facts of this case, therefore, closely parallel the rules set forth in *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), wherein a civilian cook was refused admission to a Naval installation without a hearing. The U.S. Supreme Court affirmed established doctrines.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. . ."
>
> ". . .Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. . ."
>
> ". . .Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation. . ."
>
> "Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the

internal operation of an important federal military establishment. . ."

In addition, the record quite clearly establishes that Dr. Adler made no request for a hearing until six months after the termination of his employment, then claiming for the first time that his staff privileges were reduced.

Although the length of time involved in this delay under all the circumstances may not be sufficient to invoke the doctrines of estoppel or laches, it does indicate that Dr. Adler was not too firm in his conviction that there was any "reduction of privileges" authorizing an appeal to the Joint Conference Committee (Staff By-Laws Section V).

Plaintiff vigorously asserts that his Constitutional rights were also violated because the regulation limiting the use of the laboratory was promulgated by the Chief of Medicine alone. The evidence supports the conclusion, however, that this decision was reached after consultation with Dr. James J. Leonard of the Department of Medicine at the University of Pittsburgh, and apparently concurred in by Dr. Adler (Trans. Final Hearing, Vol. 1, pp. 234-237) and Mr. Goldberg, the Executive Director. This is consistent with the By-Laws, Article V, Section 1, which provide, *inter alia* that the "Department Chief shall have the responsibility for and the authority over the administration, organization and conduct of all his departmental activities." There is "substantial evidence" that the policy was adopted only after careful study of all available information sufficient to satisfy legal standards *(N.L.R.B. v. Columbian Enameling and Stamping Co.*, 306 U.S. 292 (1939). The policy rests on grounds relevant to the hospital objectives, and hence Constitutional safeguards are protected *(McGowan, supra*, 366 U.S. 425).

Finally, it is abundantly clear from the evidence that other staff physicians cannot perform diagnostic procedures without

utilizing the departmental facilities and the staffs provided for such purposes. The activities of this Laboratory are essentially diagnostic.

This Court finds the remaining contentions of plaintiff equally without merit.. The Hospital is not engaged in the corporate practice of medicine. This claim was not specifically raised at the hearing nor by the pleadings. Even if it were, there is no factual or legal basis for such a contention. Dr. Adler himself participated in the program which he now challenges, hence raising the spectre of the "unclean hands" doctrine. Additionally, cases such as *Neil v. Gimbel Bros., Inc.*, 330 Pa. 210 (1938) and *McMurdo v. Getter*, 10 N.E.2d 139 (1937) proclaim only that a professional practitioner may not render professional services under circumstances in which the contractual relationship is with the commercial employer, not the professional. A public hospital is not a commerical enterprise, and it exists solely to render medical aid, research and education. The fact that a given department in a hospital may receive more income than it has expenses at a given time does not change the hospital into a commercial enterprise since no personal profit is involved. Medical corportaions have generally received statutory and judicial approval. (*Complete Service Bureau v. San Diego County Medical Society*, 43 Cal.2d 201, 272 P.2d 201, 272 P.2d 497; *State Electro-Medical Institute v. Platner*, 103 N.W. 1079, 74 Neb. 23 (1905); *Pa. Nonprofit Corp. Law*, 15 Pa. P.S. 7001, *et seq.*, 7212, 7219, *Pa. Medical Practice Act*, 63 Pa. P.S. Sec. 401 *et seq. Professional Corporation Law*, 1970, 15 P.S. 2901, et seq.

Likewise, the patient's right to choose his physician is not denied by the Montefiore policy of full-time, exclusive Laboratory directorship. The right of a patient to choose his physician has been affirmed by all Courts since the *Bonham case*, supra, cited by plaintiff, decided in 1610. We must repeat that we are

here talking about diagnostic procedures. It is self evident to every patient that his physician seeks the aid of all hospital facilities prior to determining the proper course of treatment. These are made available to all patients as the individual neeeds arise. Indeed hospitals exist because it

> ". . . is primarily a service organization. It serves three groups: The patients, its doctors, and the public. It furnishes a place where the patient, whether poor or rich may be treated under ideal conditions. It makes available room, special diet, X-ray, laboratory, surgery and a multitude of other services available through the advances of medical science. Essential to the administration of these techniques is the corps of highly trained nurses and student nurses who are on duty twenty-four hours per day. In the large hospitals there are the interns and residents whose presence makes it possible for the hospital to do a better job. In addition, the hospital . . . must have administration to see that its services function properly and are coordinated, and that patients are received and cared for regardless of the hour or the patient's condition. Nothing can be left to chance because a slip may mean a life or many lives."

(Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 221 P.2d 31 (1951). The patient's physician determines the type of tests, the diagnostic procedures to be used and the departments to be utilized. The sole decision for subsequent tests lies with the patient's physician, as does the course of treatment, therapy or surgery indicated.

The fact that Montefiore renders wide community service and that certain members of the Jewish Community may prefer it does not place the hospital in any special category under which it should be denied the right to regulate its own internal

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This Court finds the remaining contentions of plaintiff equally without merit.. The Hospital is not engaged in the corporate practice of medicine. This claim was not specifically raised at the hearing nor by the pleadings. Even if it were, there is no factual or legal basis for such a contention. Dr. Adler himself participated in the program which he now challenges, hence raising the spectre of the "unclean hands" doctrine. Additionally, cases such as *Neil v. Gimbel Bros., Inc.*, 330 Pa. 210 (1938) and *McMurdo v. Getter*, 10 N.E.2d 139 (1937) proclaim only that a professional practitioner may not render professional services under circumstances in which the contractual relationship is with the commercial employer, not the professional. A public hospital is not a commerical enterprise, and it exists solely to render medical aid, research and education. The fact that a given department in a hospital may receive more income than it has expenses at a given time does not change the hospital into a commercial enterprise since no personal profit is involved. Medical corportaions have generally received statutory and judicial approval. (*Complete Service Bureau v. San Diego County Medical Society*, 43 Cal.2d 201, 272 P.2d 201, 272 P.2d 497; *State Electro-Medical Institute v. Platner*, 103 N.W. 1079, 74 Neb. 23 (1905); *Pa. Nonprofit Corp. Law*, 15 Pa. P.S. 7001, *et seq.*, 7212, 7219, *Pa. Medical Practice Act*, 63 Pa. P.S. Sec. 401 *et seq. Professional Corporation Law*, 1970, 15 P.S. 2901, et seq.

Likewise, the patient's right to choose his physician is not denied by the Montefiore policy of full-time, exclusive Laboratory directorship. The right of a patient to choose his physician has been affirmed by all Courts since the *Bonham case*, supra, cited by plaintiff, decided in 1610. We must repeat that we are

here talking about diagnostic procedures. It is self evident to every patient that his physician seeks the aid of all hospital facilities prior to determining the proper course of treatment. These are made available to all patients as the individual neeeds arise. Indeed hospitals exist because it

> "... is primarily a service organization. It serves three groups: The patients, its doctors, and the public. It furnishes a place where the patient, whether poor or rich may be treated under ideal conditions. It makes available room, special diet, X-ray, laboratory, surgery and a multitude of other services available through the advances of medical science. Essential to the administration of these techniques is the corps of highly trained nurses and student nurses who are on duty twenty-four hours per day. In the large hospitals there are the interns and residents whose presence makes it possible for the hospital to do a better job. In addition, the hospital ... must have administration to see that its services function properly and are coordinated, and that patients are received and cared for regardless of the hour or the patient's condition. Nothing can be left to chance because a slip may mean a life or many lives."

(Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 221 P.2d 31 (1951). The patient's physician determines the type of tests, the diagnostic procedures to be used and the departments to be utilized. The sole decision for subsequent tests lies with the patient's physician, as does the course of treatment, therapy or surgery indicated.

The fact that Montefiore renders wide community service and that certain members of the Jewish Community may prefer it does not place the hospital in any special category under which it should be denied the right to regulate its own internal

affairs. Although Presbyterian-University Hospital has always been essentially university affiliated, Montefiore has reached its similar position through an evolutionary process.

At the present time, Montefiore and Presbyterian Hospitals have equal percentages of undergraduate medical students learning on their premises. That percentage is forty-five for Montefiore and an equal figure for Presbyterian. Moreover, Montefiore is a corporate member with Presbyterian in the University Health Center (Transcript of Final Hearing, Vol. 1, pp. 247, 248, 249). Also, the terms and conditions of their affiliation with the Medical School are substantially similar (Stipulation Exhibit 2; Defendant's Final Hearing Exhibit J). Dr. Leonard confirmed this by pointing out that the relationships of Montefiore and Presbyterian to the Medical School and the teaching program were identical (Transcript of Final Hearing, Vol. 1, pp. 276, 280). There has been ample testimony that the integration of Montefiore into the University's Medical School program has provided substantially increased clinical facilities and has enhanced the ability of the School to turn out larger numbers of students.

Montefiore has taken this road and has implemented a program which is accepted as one method of achieving these purposes. However, while Montefiore does remain a community hospital in this very real sense, it is not a community hospital in the sense that it will only serve the needs and desires of private, attending physicians.

It has been appropriately stated that "a hospital is no annex to every doctor's office. . ." *Dayan v. Wood River Township Hospital*, 18 Ill. App.2d 1963, 152 N.E.2d 205, 208 (1958).

Montefiore has determined that limiting the performance of procedures to the full-time Directors of the Laboratories,

promotes better patient care, enhances the teaching system and facilitates hospital administration. Substantial and overwhelming evidence has been received to prove these points. No evidence has been received from which the slightest inference can be drawn that there are any disadvantages to the public. In fact, on the basis of society's need for more efficient patient care and the long-standing need for more physicians, the interests of society are being advanced.

Finally, Adler has shown no legally cognizable disadvantages to himself.

Neither the hospital policy nor this decision in any way reflects upon the outstanding qualifications of Dr. Adler as a physician, as a cardiologist and as a heart-catheterization technician. We hold simply that on this record Dr. Adler has not established that he has been deprived of any Constitutional or other legal rights, and that the policy of Montefiore in limiting the use of the Cardio-Catheterization Laboratory is not unreasonable, arbitrary, or capricious, and does not violate rights of plaintiff, patients nor the community.

Accordingly, the Chancellor enters the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Montefiore Hospital's conduct and actions are state actions within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The adoption of the policy that all procedures would be performed by the full-time Director of the Laboratory was reasonable and was related to the purposes and objectives of Montefiore Hospital.

4. The maintenance and continuation of the policy that all procedures would be performed by the full-time Director of the Laboratory is reasonable and is rationally related to the purposes and objectives of Montefiore Hospital, viz., to provide optimal patient care, to promote the teaching program, and to provide more effective hospital administration.

5. Montefiore Hospital's continuance of the established policy and practice that all Laboratory procedures, including catheterizations, would be performed by the full-time Director of the Laboratory does not violate the substantive or procedural requirements of the Fourteenth Amendment Due Process clause or the Equal Protection clause.

6. Montefiore Hospital was not and is not engaged in the corporate practice of medicine by virtue of its past employment of Adler or its present employment on a full-time basis of a physician to perform cardiac catheterizations.

7. Montefiore Hospital has not interfered with the patient's right to choose his own physician by limiting the performance of cardiac catheterizations to the employed director of its Laboratory.

8. Montefiore Hospital has not deprived or withheld any privileges from Adler which are necessary for him to effectively treat his patients at Montefiore Hospital.

9. Montefiore Hospital was not required to give Adler a hearing on the termination of his employment or at any time thereafter.

10. Adler as an attending physician, is not entitled as a matter of right to use the hospital's Laboratory for his own personal profit.

11. Adler is being accorded all rights and privileges identically with all other staff cardiologists not employed by Montefiore Hospital.

12. Adler is not entitled to the relief prayed for.

13. A decree will be entered in favor of the defendant, Montefiore Hospital.

DECREE NISI

AND NOW, September 13th, 1971, it is ORDERED, ADJUDGED and DECREED, as follows:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Montefiore Hospital's conduct and actions are state actions within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The adoption of the policy that all procedures would be performed by the full-time Director of the Laboratory was reasonable and was related to the purposes and objectives of Montefiore Hospital.

4. The maintenance and continuation of the policy that all procedures would be performed by the full-time Director of the Laboratory is reasonable and is rationally related to the purposes and objectives of Montefiore Hospital, viz., to provide optimal patient care, to promote the teaching program, and to provide more effective hospital administration.

5. Montefiore Hospital's continuance of the established policy and practice that all Laboratory procedures, including catheterizations, would be performed by the full-time Director of the Laboratory does not violate the substantive or procedural requirements of the Fourteenth Amendment Due Process clause or the Equal Protection Clause.

6. Montefiore Hospital was not and is not engaged in the corporate practice of medicine by virtue of its past employment of Adler or its present employment on a full-time basis of a physician to perform cardiac catheterizations.

7. Montefiore Hospital has not interfered with the patient's right to choose his own physician by limiting the performance of cardiac catheterizations to the employed director of its Laboratory.

8. Montefiore Hospital has not deprived or withheld any privileges from Adler which are necessary for him to effectively treat his patients at Montefiore Hospital.

9. Montefiore Hospital was not required to give Adler a hearing on the termination of his employment or at any time thereafter.

10. Adler as an attending physician, is not entitled as a matter of right to use the hospital's Laboratory for his own personal profit.

11. Adler is being accorded all rights and privileges identically with all other staff cardiologists not employed by Montefiore Hospital.

12. Adler is not entitled to the relief prayed for.

13. A decree will be entered in favor of the defendant, Montefiore Hospital.

/s/ FRANK R. BOLTE
Chancellor

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
Civil Division

LAWRENCE N. ADLER,
Plaintiff No. 1501 July Term, 1970

vs.

MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, In Equity
Defendant

Before: *McKenna and Bolte, J.J.*

OPINION

BOLTE, J.

This case is before this Court En Banc on exceptions filed by Adler to the Adjudication and Decree Nisi entered by the Chancellor denying his request for an injunction to compel Montefiore to permit him to use the hospital Cardiac Catheterization Laboratory for the care, treatment and diagnosis of his own patients and patients referred to him by other physicians.

Adler is a qualified practicing cardiologist who is on the active-staff of Montefiore Hospital, and other hospitals. From July 16, 1963, until July 1, 1969, Montefiore also employed him as part-time Director of its Catheterization Laboratory. During his period of service he performed all the procedures in this laboratory, in accordance with the Montefiore policy, to the exclusion of other qualified cardiologists. From July 16, 1963, to July 1, 1969, when his employment as Director of the Laboratory was terminated, Adler served both as a paid employee, as a Director and as a private physician on the hospital's Medical Staff.

In April, 1969, Adler was informed that a full-time Director was being employed by the hospital and that his employment as part-time Director would be terminated. Although he concedes that the hospital had the right to hire a full-time Director and terminate his employment as Director, he contends that he should be permitted to continue to perform procedures in the Catheterization Laboratory as an incident to his staff privileges, and that the hospital's refusal to permit him to do so violates his Constitutional rights.

From July 1, 1969, to March 1, 1970, he was designated and he acted as part-time Chief of Montefiore's Coronary Care Unit, at which time he was relieved of this position also, but remained on the hospital Medical Staff as a cardiologist. His removal from this position is not involved in this litigation.

Approximately eight months after the termination of his employment as Laboratory Director, he requested a hearing before the Joint Conference Committee, alleging a reduction of his staff privileges. The hearing was refused by the Committee on the basis that Adler's right to perform the laboratory procedures was an incident of his employment and not of his staff membership, and that he had not been deprived of any privileges extended to any other cardiologist on the Staff. This refusal to grant a hearing before the Committee is also challenged in this proceeding as being violative of his Constitutional rights.

The Court en banc is limited in its review to the specific exceptions raised by the Plaintiff subject, however, to the further limitation set forth in *Weir v. Potter T. & M.G. Co.*, 323 Pa. 212 (1936) at page 218:

> "In *Cruzan v. Cruzan*, 243 Pa. 165, 89 A. 876, this court said: 'Nothing but clear error will warrant the setting aside of findings of fact by a chancellor. What was said in the recent case of Eppsteiner v. Isman, 239 Pa. 393 [86 A.

878]: 'The findings of fact by a judge, which involve the credibility of witnesses and the weight to be given their testimony, will be given the effect of a verdict of a jury and they will not be disturbed where there is testimony to support them' was a repetition of what before had been repeatedly said on the same subject.' In the instant case there was testimony to support the findings of fact of the chancellor and we find no reason for disturbing them or the decree entered pursuant to his findings."

The question, therefore, before the Court en banc at the present time is whether the Chancellor's Adjudication is supported by the record.

Although plaintiff filed 62 exceptions to the Adjudication he did not specifically assert that any of the findings were not supported by the record. Actually, every Finding of Fact of the Chancellor recites the record which supports that Finding, except Findings 3, 48, 50 (2, 5, 9) 53. No exceptions were filed to Findings 3 and 53. The record was again carefully examined by this Court, and we conclude that the record does amply support all the findings for which references are given, and we further find and hold that all other findings are supported by the record.

Basically, plaintiff excepts to the Chancellor's findings and conclusions concerning the following areas:

1. Plaintiff's motivation and conduct.
2. The role of the hospital as a community hospital.
3. The physicians right to perform procedures.
4. The right of patients.

The legal challenge is directed to basic principles rather than specific facts, principally that the Chancellor's conclusions are

improper, not the question of whether the record supports the Adjudication.

Plaintiff charges that "fundamental error" was committed by the Chancellor when he stated in the "Statement of Issues" that the suit was filed to "permit him (Adler) to use the hospital laboratory facilities for his own use and profit", because it led the Chancellor to make findings not supported by the record. Suffice it to say that there was no Finding to this effect. This statement merely summarizes the allegations of plaintiff's Complaint that the hospital "has refused to permit plaintiff to utilize the facilities of its Laboratory, . . . to perform, provide and utilize specialized procedures upon his patients and upon the patients of other physicians." A statement of issues is neither a finding of fact nor a conclusion of law. It merely summarizes the position of the parties. Adler incorrectly assumes that this statement of the issue compelled the findings of fact and conclusions by the Chancellor. The reverse is obviously the case. The overwhelming evidence led inevitably to the Chancellor's findings of fact and conclusions of law which, in turn, pointed unerringly to the issue as stated by the Chancellor.

An examination of the entire Adjudication makes it obvious that the Chancellor based his decision on the reasonableness of the hospital policy, its probable beneficial impact on patient care, its enhancement of the teaching program and more efficient hospital administration. Moreover, the Chancellor emphasized that the record failed to show any discrimination against Adler individually or in his capacity as a practicing cardiologist.

There was no legal requirement on the defendant to establish that *only* full time salaried physicians can properly perform the many procedures in the cardiovascular laboratory, and we find that the failure to so find by the Chancellor does not constitute a defect, "fatal" or otherwise, argued by plaintiff.

Nor is this Court persuaded by the analogies drawn by the plaintiff that such reasoning would exclude all but full-time paid lawyers, such as public defenders, district attorneys, etc. from the use of our Court facilities. In these contentions Adler ignores what we perceive to be the main issue in this case: whether Montefiore's policy of limiting the performance of procedures in the Laboratory to the full-time Director was a reasonable and valid method of operating the laboratory in a major university-teaching hospital.

There was ample evidence to support the Chancellor's affirmative findings and conclusions on this point: the great majority of major university-affiliated teaching hospitals limit the performance of procedures in their Cardiac Catheterization Laboratories to full-time physicians, to the exclusion of qualified part-time or attending physicians; the large non-university hospitals in Pittsburgh, such as Shadyside, St. Francis, Allegheny General and Mercy, all employ full-time physicians to perform these procedures; undisputed evidence offered by Montefiore and verified in part by Adler's testimony and the testimony of Adler's expert witness, Dr. Elliot Segal, that limiting the performance of procedures to the full-time Director of the Laboratory improves patient care, enhances the teaching program and promotes more efficient administration; the full-time physician is permanently on the scene, working with patients in the presence of the students and house staff. Being on the premises full-time, they are available for teaching before, after and during the performance of the procedures and engaging in the constant dialogue which is so important to the learning process for new physicians.

Finally, the reasonableness of Montefiore's policy has been upheld by all of the legal prececents concerned with such regulation. Three cases which are directly in point have upheld the right of a hospital, public or private, to limit the performance of

diagnostic and therapeutic x-ray procedures in the hospital's x-ray laboratories to those physicians whom the hospital has hired on a full-time basis or with whom the hospital has contracted to perform all of its radiological procedures. These decisions upheld the exclusion of other fully qualified radiologists on the hospitals' staffs from utilizing the hospitals' x-ray laboratories. *Benell v. City of Virginia*, 250 Minn. 559, 104 N.W. 2d 633 (1954); *Blank v. Palo Alto-Stanford Hospital Center*, supra; *Letsch v. Northern San Diego County Hospital District*, 55 Cal. Reptr. 118 (1966). Interestingly enough, as in the instant case, plaintiffs Benell and Letsch were formerly employed by their respective hospitals as the only physicians permitted to perform radiological procedures.

Legal principles invoked by the Courts to determine the reasonableness of a regulation are well established: (1) The policy must be neither arbitrary nor capricious, nor fraudulent or conspiratorial (See *Gambone v. Commonwealth*, 375 Pa. 547 (1954). (2) The wisdom of regulatory legislation is not within the province of this Court. The Fourteenth Amendment is not utilized by the courts to invalidate state acts because the court deems said acts to be unwise or to be imcompatible with their own social or economic beliefs. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1029 (1963). (3) The basic tests for determining the validity of legislation still remain: is it arbitrary, can a less restrictive means be used, and whether there is a rational connection between the regulation and the interest which is sought to be protected.[1] (4) A hospital has the right to govern the use of its facilities and the practice of medicine under reasonable rules and regulations (American Jurisprudence, 2d, Vol. 40, Sec. 8, Hospitals.) (5) The Fourteenth Amendment does not censure

[1]The three tests for determining whether a regulation or statute violates the Due Process Clause have been followed by the Pennsylvania Supreme Court. See *Gambone v. Commonwealth*, 375 Pa. 547 (1954). This case cited in *Pennsylvania State Board of Pharmacy v. Pastor*, 441 Pa. 186 (1971).

a state for allowing privileges to one group of persons while declining them to others, where the regulation or policy has a reasonable purpose and embodies a reasonable means of achieving that purpose. *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101 (1961).

An examination of the facts based on these principles leaves no doubt but that the regulation is reasonable, proper and necessary to effectuate the basic interests of the hospital and is not violative of any constitutional rights of the plaintiff. The hospital had a choice of remaining as a community hospital, or affiliating itself with the University so as to become an integral part of the University Health Center. In its judgment the best interests of the community, the patient and the hospital would be served by so doing. Although some physicians may disagree[2] with such an approach, the experience of many university-affiliated hospitals points to the wisdom of such an approach. The fact that all hospitals utilizing this approach do not treat all Department Heads on the same basis does not prevent Montefiore from taking the approach which in its judgment will best serve its interests.

Adler claims that the Chancellor erred in making an assumption that Montefiore's formal university affiliation relieves it of its duty to open its facilities to qualified physicians. Such a claim is substantiated neither by the Adjudication nor the facts. Such an assertion by the plaintiff fails to take note of Montefiore's concommitant duties to provide optimum patient care and the best atmosphere for training of the hundreds of future physicians for which society has a desperate need.

Notwithstanding the fact of formal university affiliation, Montefiore has the duty to operate its facilities in a manner

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[2] "Is Your Hospital Trying to go Big Time? Stop It! ", *Medical Economics*, April 26, 1971.

which will provide optimum patient care and the best training possible, which duty it is properly discharging.

Consistent with this duty during Adler's tenure as Director of the Laboratory, Adler and the hospital administration limited the performance of procedures to the Director of the Laboratory. Thus, there were independent bases, apart from formal university affiliation, which dictated the adoption of this policy. Adler, in fact in 1967, argued quite strenuously for limiting the performance of these procedures to one person (himself), because of the low volume of procedures performed in the Montefiore Laboratory and because of other considerations which would improve patient care. (Troen Deposition, pp. 27, 31; Transcript of Final Hearing, Vol. 1, pp. 223, 235-238).

Unfortunately, Adler has the mistaken notion that because Montefiore still retains its identity as a Jewish and a community Hospital, it must open its doors and make its facilities an annex to each doctor's office, regardless of other considerations which directly affect and benefit the welfare of the patient and the community.

The fact that Montefiore renders wide community service and that certain members of the Jewish Community may prefer it does not place the hospital in any special category under which it should be denied the right to regulate its own internal affairs.

While Montefiore does remain a community hospital in a very real sense, it is not a community hospital in the sense that it will only serve the needs and desires of private, attending physicians. It has been appropriately stated that "a hospital is no annex to every doctor's office . . ." *Dayan v. Wood River Township Hospital*, 18 Ill. App. 2d 1963, 152 N.E. 2d 205, 208 (1958).

Montefiore has determined that limiting the performance of procedures to the full-time Directors of the Laboratories, promotes better patient care, enhances the teaching system and facilitates hospital administration. Substantial and overwhelming evidence has been received to prove these points. No evidence has been received from which the slightest inference can be drawn that there are any disadvantages to the public. In fact, on the basis of society's need for more efficient patient care and the long-standing need for more physicians, the interests of society are being advanced.

We have carefully reviewed all other aspects of the Adjudication and Decree with particular reference to the various arguments advanced by plaintiff. We find his contentions to be without merit. Plaintiff's position with regard to a physician's right to perform procedures as well as the rights of patients were carefully considered by the Chancellor in the Adjudication filed, and we concur in his Findings and Conclusions that the Montefiore policy is a reasonable regulation founded on rational justification (*McGowan v. Maryland*, 366 U.S. 420; *Fleming v. Nestor*, 363 U.S. 603 at 611; *Dandridge v. Williams*, 397 U.S. 471 (1970).

Plaintiff also filed exceptions to two rulings of the Court: (1) that all testimony relating to universtiy affiliation be stricken and disregarded; and (2) that the Court improperly admitted Exhibit K, being a chart showing the number of procedures performed in the Catheterization Laboratory from Jan.1, 1966 to June 1, 1969.

These exceptions were not argued nor mentioned in plaintiff's brief, and, therefore, could be dismissed for this reason alone.

The chart was prepared from the book of original entry kept in the Laboratory, by the Director, and the original

logbooks were offered as part of Exhibit K. We find Exhibit K admissible pursuant to Act of May 4, 1939, L.L. 42, 28 P.S. Secs. 91a, 91b, the Uniform Business Records Act (*Freedman v. Mutual Life Ins. Co.*, 342 Pa. 404).

The testimony relating to the university affiliation was admissible to determine the reasonableness of the hospital's policy, the justification for this policy, and that it was not a capricious or arbitrary regulation.

Neither the hospital policy nor this decision in any way reflects upon the outstanding qualifications of Dr. Adler as a physician, as a cardiologist and as a heart-catheterization technician. We hold simply that on this record Dr. Adler has not established that he has been deprived of any Constitutional or other legal rights, and that the policy of Montefiore in limiting the use of the Cardio-Catheterization Laboratory is not unreasonable, arbitrary, or capricious, and does not violate rights of plaintiff, patients nor the community.

Accordingly, all exceptions are overruled. The Decree Nisi is affirmed. Final Decree is entered, consistent with this Opinion.

Appendix E
80-a

FINAL DECREE

AND NOW, December 10, 1971, after consideration of the briefs, all exceptions filed by the plaintiff to the Adjudication and Decree Nisi are overruled and dismissed. Judgment is entered for the defendant.

By The Court

BOLTE, J.
J.

Eo die, exceptions noted to plaintiff and bill sealed.

FRANK R. BOLTE (SEAL)
Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
Civil Division

LAWRENCE N. ADLER,
Plaintiff

v.

No. 1501 July Term, 1970
In Equity

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA,
Defendant

No Real Estate

COMPLAINT IN EQUITY

Count I

1. Plaintiff is an individual residing at Woodland Manor, Pittsburgh, Allegheny County, Pennsylvania.

2. Defendant is a non-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania and operates The Montefiore Hospital at Fifth Avenue at Darragh, Pittsburgh, Allegheny County, Pennsylvania. As used herein, "defendant" refers to the defendant, its officers, directors, agents and employees.

3. At all times relevant to plaintiff's cause of action, plaintiff has been licensed to practice medicine in the Commonwealth of Pennsylvania. On April 3, 1964, plaintiff was certified by the American Board of Internal Medicine. On October 11, 1969, plaintiff was certified by the American Board of Internal Medicine, with a sub-specialty in cardiovascular diseases.

4. In July, 1963, plaintiff joined the staff of The Montefiore Hospital as a Junior Assistant in the Division of Internal Medicine - Cardiovascular Diseases, Department of Medicine.

Plaintiff was reappointed, and received written confirmations thereof, as Junior Assistant for 1964 and as Senior Assistant - Active Staff, Department of Medicine for 1965, 1966, and 1967. Plaintiff has remained on the staff of The Montefiore Hospital during 1968, 1969, and 1970, as Senior Assistant but has received no confirmation of reappointment.

5. Plaintiff was retained by defendant in July, 1963, on a part-time basis, as Director of defendant's Cardiac Catheterization Laboratory (herein called "Laboratory") to establish, organize and activate cardiac catheterizations and other procedures.

6. From July, 1963 to July 1, 1969, plaintiff devoted and applied his special skills and knowledge to the establishment, organization, equipping, remodeling, operation and supervision of the Laboratory.

7. From July, 1963 to July 1, 1969, plaintiff performed, provided and utilized numerous procedures, treatments and techniques (herein called "specialized procedures") in the Laboratory upon patients of The Montefiore Hospital, upon his patients and upon the patients of other physicians and surgeons who sought plaintiff's professional assistance; such procedures include, among others, those set forth in paragraph 12.

8. Plaintiff has devoted over ten years of education and practice to the development of skills and knowledge in the performance of these specialized procedures.

9. During or about the middle of April, 1969, plaintiff was informed by defendant that, effective July 1, 1969, he would be relieved of his position as Director of the Laboratory.

10. Plaintiff was also informed, at the time and in the manner set forth in paragraph 9, that he would no longer be entitled to privileges to perform cardiac catheterizations, to

install pacemakers or to perform the other specialized procedures which he had performed in the Laboratory.

11. The action described in paragraph 9 was contrary to, and in direct conflict with, the representations and assurances made by defendant to plaintiff during or about late 1968, at which time defendant represented and assured plaintiff that it did not intend to relieve plaintiff of his directorship and that, should such plans be formulated, they would be gradually, rather than immediately, implemented.

12. Since July 1, 1969, defendant has refused to permit plaintiff to utilize the facilities of its Laboratory, or any other facilities of The Montefiore Hospital, to perform, provide and utilize specialized procedures upon his patients and upon the patients of other physicians and surgeons who have sought plaintiff's professional assistance, which specialized procedures plaintiff had theretofore performed in the Laboratory. Such specialized procedures include, but are not limited to, cardiac catheterizations, installation of pacemakers, angiocardiograms, cardioversions and coronary arteriograms.

13. Plaintiff is fully qualified to perform all such specialized procedures by reason of his special skills and knowledge.

14. Since July 1, 1969, defendant has granted to other physicians the privilege to perform procedures, including the privilege of installing pacemakers, in the Laboratory, while it has denied plaintiff privileges to perform procedures in the Laboratory.

15. Although other physicians are performing procedures in the Laboratory, plaintiff's use of the Laboratory, on a reasonable basis, to perform specialized procedures would not interfere either with the other physicians or with the overall operation of the Laboratory.

16. Defendant's conduct, as set forth in paragraph 12, has denied plaintiff the ability, privilege and right to practice his medical specialty on behalf of, or at the request of plaintiff's patients or patients of physicians and surgeons who have sought plaintiff's professional assistance.

17. Defendant's conduct, as set forth in paragraph 12, constitutes a reduction in plaintiff's privileges as a member of the Active Medical Staff of The Montefiore Hospital.

18. The By-Laws of the Medical Staff of Montefiore Hospital Association of Western Pennsylvania, which were approved by the Governing Body of The Montefiore Hospital and which are attached hereto, marked "Exhibit A" and specifically made a part hereof, provide in Article III:

"*Section V. Appeals*

Subsection 1. In any case where reappointment is not recommended or where reduction of privileges is recommended, the Executive Director shall notify the physician or dentist concerned and he shall be given an opportunity to appear before the Joint Conference Committee.

Subsection 2. After the hearing as outlined above, the Joint Conference Committee shall make final recommendation to the Executive Management Committee."

19. Contrary to said By-Laws, defendant did not notify plaintiff of the recommendation of reduction of privileges and defendant did not give plaintiff an opportunity to appear before the Joint Conference Committee. Contrary to said By-Laws, defendant reduced plaintiff's privileges, without notification and without a hearing.

20. Plaintiff made numerous oral requests to defendant commencing in July, 1969, that he be permitted to perform specialized procedures in The Montefiore Hospital. Defendant failed to act on such oral requests.

21. Commencing in December, 1969, plaintiff, having had his privileges reduced and, not having had the hearing provided by the By-Laws, requested in writing that the procedure provided by the By-Laws be complied with by defendant. Copies of plaintiff's written requests to defendant are attached hereto as Exhibits "B", "C", "D" and "E".

22. Defendant refused and continues to refuse plaintiff the permission to utilize any of its facilities for the purposes set forth in paragraph 12.

23. Defendant has refused plaintiff's request that a hearing be held in compliance with the By-Laws.

24. By reason of defendant's conduct, as set forth in paragraphs 12, 16, 17, 19, 22 and 23, defendant has suffered and will continue to suffer a denial of his right to practice those skills and abilities which he has acquired as a cardiologist and patients who desire plaintiff's professional assistance have been and will continue to be deprived of their right to be treated by him.

25. Unless plaintiff is promptly restored to his right to perform specialized procedures at The Montefiore Hospital, he will have been seriously and irreparably harmed.

26. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff requests this court

(a) to preliminarily and permanently enjoin defendant, its officers, directors agents and employees from prohibiting or otherwise interfering with defendant's

exercise of privileges in the Laboratory and in the other facilities of The Montefiore Hospital on the reasonable basis, which privileges include, but are not limited to, cardiac catheterizations, installation of pacemakers, angiocardiograms, cardioversions and coronary arteriograms;

(b) to grant such other relief as the court shall deem appropriate.

Count II

27. Paragraphs 1 through 25 are incorporated herein by reference and specifically made a part hereof.

28. The Montefiore Hospital, licensed and regulated by the Commonweatlth of Pennsylvania, was established for the purpose of providing comprehensive programs of health care to patients and for the promotion of medical, dental and health education and research. For the purposes of education and research, defendant affiliated itself with the Schools of Medicine, Dental Medicine, Nursing, Health Related Professions and Pharmacy and the Graduate School of Public Health of the University of Pittsburgh, a state-related university receiving funds from the United States government and from the Commonwealth of Pennsylvania.

29. The Montefiore Hospital is a Medicare-approved hospital and receives funds from the United States government with respect to Medicare patients. The Montefiore Hospital receives funds from the Commonwealth of Pennsylvania for charity and/or welfare patients.

30. By reason of the licensing, the affiliation with a state-related university and the financial support, as set forth in paragraphs 28 and 29, The Montefiore Hospital is a public institution and the conduct and actions of defendant are "state actions".

31. Because defendant's conduct and actions are "state actions" and because defendant operates a public institution, defendant may neither arbitrarily reduce plaintiff's privileges nor arbitrarily exclude plaintiff from the reasonable exercise of those privileges which he is qualified to perform.

32. Defendant has, by reason of the conduct and actions set forth herein, arbitrarily reduced plaintiff's privileges and has arbitrarily excluded plaintiff from the reasonable exercise of those privileges which he is qualified to perform without due process of law.

33. Defendant has, by reason of the conduct and actions as set forth in paragraph 14, discriminated against plaintiff by permitting other qualified private physicians to utilize the facilities of the Laboratory while denying that privilege to plaintiff thereby denying plaintiff equal protection of the laws.

34. By reason of defendant's conduct, as set forth in paragraph 32, plaintiff has suffered and will continue to suffer a denial of his right to practice those skills and abilities which he has acquired as a cardiologist and patients who desire plaintiff's professional assistance have been and will continue to be deprived of their right to be treated by him.

35. Unless plaintiff is promptly restored to his right to perform specialized procedures at The Montefiore Hospital, he will have been seriously and irreparably harmed.

36. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff requests this court

(a) to preliminarily and permanently enjoin defendant, its officers, directors, agents and employees from reducing plaintiff's privileges and from excluding plaintiff from the reasonable exercise of privileges which he is quali-

fied to perform, including, but not limited to cardiac catheterizations, installation of pacemakers, angiocardiograms, cardioversions and coronary arteriograms;

(b) to grant such other relief as the court shall deem appropriate.

Count III

37. Paragraphs 1 through 25 and 27 through 35 are incorporated herein by reference and specifically made a part hereof.

38. Defendant's conduct, as set forth herein, has caused plaintiff substantial loss of income and other expenses and damages.

39. By reason of defendant's conduct, as set forth herein, plaintiff has suffered and will continue to suffer such financial losses.

40. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff requests this court

(a) to order defendant to pay plaintiff the amount of the financial losses incurred by him as a result of defendant's conduct and actions;

(b) to grant such other relief as the court shall deem appropriate.

Attorneys for Plaintiff
KAUFMAN & KAUFMAN
415 Oliver Building
Pittsburgh, Pennsylvania 15222

[EXHIBITS TO COMPLAINT NOT PRINTED]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
Civil Division

LAWRENCE N. ADLER,
Plaintiff

vs.

APPEARANCE DOCKET
No. 1501 July Term, 1970
In Equity

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA,
Defendant

ANSWER AND NEW MATTER

ANSWER
Count I

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied as stated. In July, 1963, contemporaneously with his employment by Defendant, Plaintiff was given a temporary appointment as a member of the Active Medical Staff of the Department of Medicine of Defendant. In December, 1963, Plaintiff was appointed a Junior Assistant on the Active Medical Staff of the Department of Medicine for the year 1964. Thereafter, Plaintiff was promoted to Senior Assistant on the Active Medical Staff of the Department of Medicine for the year 1965 and has continued at that capacity to the present time.

Plaintiff was given written notice of said appointments for the years 1964 through 1968, and subsequently was advised orally, along with all other physicians on Defendant's staff, that

the absence of written notification for the years 1969 and 1970 did not alter or diminish his status as a Senior Assistant on the Active Medical Staff of the Department of Medicine.

5. Denied as stated. In the spring of 1963, Plaintiff was employed by Defendant on a half-time basis to establish, organize, and operate as Director, a Cardiac Catheterization Laboratory (then identified as the Cardiac Pulmonary Laboratory and hereinafter referred to as the "Laboratory") and to perform cardiac catheterizations and such other procedures as should from time to time be agreed upon. Plaintiff entered upon his duties as an Employee on July 16, 1963. The terms of Plaintiff's employment are set forth in a memorandum from Irwin Goldberg, Executive Director of the Hospital, to the Plaintiff, a copy being attached hereto as Exhibit "1".

6. Denied as stated. From July 16, 1963, to July 1, 1969, Plaintiff was employed as Director of Defendant's Laboratory on a half-time basis. During such time Plaintiff supervised and directed said Laboratory, and performed such laboratory procedures as were from time-to-time required of him as an employee of the Defendant.

7. Denied as stated. From July 16, 1963, to July 1, 1969, Plaintiff, as an employee of Defendant, performed various procedures (including those listed in Paragraph 12 of Plaintiff's Complaint) upon patients in Defendant's hospital for some of whom Plaintiff was the consulting cardiologist in a private capacity as a staff member, and for other patients for whom other staff members were the consulting cardiologists.

8. Admitted.

9. Denied as stated. About mid-April, 1969, Plaintiff was informed that his part-time employment as Director of Defendant's Laboratory would be terminated in July inasmuch as Defendant had employed a full-time Director. Simultaneously,

Plaintiff was informed that he would be employed as part-time Chief of Defendant's Coronary Care Unit at the same salary he received as Director of Defendant's Laboratory.

10. Denied as stated. Plaintiff was informed that upon termination of his employment as Director, in accordance with the established Hospital policy, all Laboratory procedures would continue to be performed by the full-time succeeding Director. Plaintiff was also informed that in his capacity as Chief of the Coronary Care Unit, Plaintiff was authorized, when supervising said Unit, to install temporary pacemakers for any patients in the Coronary Care Unit, as were other cardiologists employed by Defendant on a part-time basis when they were supervising the Coronary Care Unit.

11. Denied. It is denied that Defendant gave Plaintiff any assurances other than that his employment would not be terminated precipitously. It is averred that notice in mid-April of termination of his Directorship of the Laboratory and transfer to other employment at the same salary in July was adequate notice in any event.

12. Denied as stated. Both prior to July 1, 1969, and subsequently the performance of the specialized laboratory procedures referred to in Paragraph 12 of Plaintiff's Complaint has been restricted to the cardiologist employed as Director of Defendant's Laboratory, except that staff cardiologists (including Plaintiff until March 1, 1970) who as Defendant's employees were in charge of the Coronary Care Unit, were authorized to install temporary pacemakers during the periods when they were in charge of the Coronary Care Unit. Additionally, the Director of the Laboratory authorized such procedures as might be required in his absence to be performed by a designated cardiologist. As a cardiologist member of Defendant's medical staff, and since his termination as a part-time employee of

Defendant, Plaintiff has been accorded the same privileges as were and have been accorded to all cardiologists of like rank and position.

13. Admitted.

14. Denied. Since July 1, 1969, the various employed cardiologists, serving from time-to-time as head of Defendant's Coronary Care Unit (including Plaintiff prior to March 1, 1970), have been permitted to install temporary pacemakers in the Laboratory. Otherwise, all specialized laboratory procedures, including those referred to in Paragraph 12 of Plaintiff's Complaint, have been performed by Dr. Edward Curtiss, employed by Defendant as full-time Director of Defendant's Laboratory, except in one instance in his absence when the installation of a permanent pacemaker was performed by a substitute cardiologist designated by Dr. Curtiss.

15. Denied. Except as hereinbefore set forth, it is denied that other cardiologists are performing laboratory procedures in the Laboratory.

Further, it is averred that the Laboratory has always been restricted to Defendant's employees or those designated for temporary periods or purposes. Cardiologists on the Active Medical Staff were never authorized to perform laboratory procedures on their own or referred private patients.

16. Denied. Defendant has terminated Plaintiff's activities in the Laboratory only insofar as they were incident to his former employment, and has in no way denied Plaintiff the ability, privilege, or right to practice in Defendant's Hospital to the same extent accorded all other cardiologists who are members of Defendant's Medical Staff.

17. Denied. Defendant terminated Plaintiff's activities which were incident to his status as an employee. In no way has there

been any reduction of Plaintiff's privileges as a member of the Active Medical Staff.

18. Denied as stated. The copy attached to Plaintiff's Complaint is not complete in that it omits certain provisions still in force. A full and complete copy of the By-Laws of the Medical Staff is attached hereto as Exhibit "2".

19. Denied. Plaintiff's privileges as a member of the Active Medical Staff were not reduced, so that Defendant did not improperly deny Plaintiff a hearing before the Joint Conference Committee.

After full consideration on April 16, 1970, the Joint Conference Committee determined that it had no jurisdiction over Plaintiff's case since the matter concerned solely the employer-employee relationship between Defendant and Plaintiff and not privileges enjoyed by Plaintiff as a member of Defendant's Staff. Defendant's actions, therefore, were in accordance with its By-Laws.

20. Denied as stated. It is admitted that in July, 1969, Plaintiff offered to barter with Dr. Curtiss the teaching of a certain laboratory procedure in exchange for authority for Plaintiff to perform laboratory procedures on his private patients. However, Defendant avers that Plaintiff's offer was a mercenary one repugnant to Plaintiff's status as a member of Defendant's teaching staff, and inconsistent with the practice and custom in Defendant's Hospital.

It is further admitted that Plaintiff talked to various officers and future officers of Defendant's Board of Trustees, but it is denied that Plaintiff ever made such requests of the person in charge of Defendant's Department of Medicine. It is admitted that Defendant did not respond favorably to such requests as Plaintiff did make, nor was Defendant under any legal obligation to do so.

21. Denied as stated. It is admitted that the written requests attached as Exhibits "C", "D" and "E" were sent to the Chairman of the Joint Conference Committee. It is admitted that Plaintiff's President received a copy of Exhibit "B" addressed to the President of the Medical Staff. It is denied that Plaintiff's privileges as a member of Defendant's Active Medical Staff have been reduced in any way.

22. Denied as stated. It is admitted that Plaintiff was and has been prohibited from performing Laboratory procedures in Defendant's Hospital except during the period when Plaintiff was an employee of Defendant in the Laboratory or the Coronary Care Unit, in which latter capacity he was authorized to install temporary pacemakers and perform cardioversions. Further, Plaintiff may, along with other qualified cardiologists on the Active Medical Staff, perform cardioversions in emergency situations when no regular facilities are available.

23. Denied as stated. It is admitted that no hearing has been held as requested by Plaintiff. However, it is averred that the Joint Conference Committee, at its meeting of April 16, 1970, properly refused Plaintiff's request since Plaintiff's request did not relate to his reappointment or to a reduction of his staff privileges, as required in the By-Laws. To the contrary, Plaintiff's request for a hearing was made incidental to his former status as an employee.

24. Denied. In no way has Plaintiff been denied the right to practice his profession as a cardiologist. To the contrary, Plaintiff was and is a cardiologist on the Active Medical Staff with privilege to practice his profession in Defendant's Hospital identical to those of all other cardiologists on the Active Medical Staff.

25. Denied. It is denied that Plaintiff has a right to perform the specialized procedures at Montefiore Hospital. Defendant is

without knowledge of whether any harm will come to Plaintiff, such information being in the Plaintiff's exclusive possession and control, and therefore, denies the same, and demands strict proof thereof if the same be material.

26. Denied. Plaintiff has no right to equitable relief and therefore, any remedy which he may have, is at law.

Count II

27. The answers to Paragraphs 1 - 25 are incorporated herein by reference and specifically made part hereof.

28. Admitted.

29. Admitted.

30. Admitted.

31. Defendant is advised that the allegations of Paragraph 31 are a legal conclusion and that no answer thereto is required.

32. Denied. It is denied that Defendant has reduced Plaintiff's privileges in any manner whatsoever. By way of further answer, it is averred that the actions of Defendant were in its capacity as an employer dealing with an employee, and that the conduct of Defendant was neither arbitrary nor unlawful in any way.

It is further averred that the alleged privileges of the Plaintiff were not privileges, but were his mandated duties incident to his former employment as Director of the Laboratory.

33. Denied. Defendant has in no way discriminated against Plaintiff. On the contrary, Defendant has treated Plaintiff and all other cardiologists on the Active Medical Staff of Defendant in identical manner.

Defendant has in no way denied equal protection to Plaintiff in that it has permitted only its employees to perform

procedures in its laboratiores, except for emergency situations, or the installation of temporary pacemakers by cardiologists employed in the Coronary Care Unit for that purpose among other purposes.

34. Denied. Plaintiff is not permitted to perform laboratory procedures, since these were performed by him previously as a duty incident to his employment by Defendant, and which were in no sense a right or privilege of the Plaintiff independent of his status as an employee.

By way of further answer, Defendant is informed and therefore avers that Plaintiff has no standing to assert the purported rights of his past, present, or prospective patients and that, therefore, no answer to this allegation is required.

35. Denied. Plaintiff has been deprived of no "right" to which a court may restore him. By way of further answer, Defendant is without knowledge of whether Plaintiff will be seriously or irreparably harmed, said information being in the exclusive control of the Plaintiff. The same is, therefore, denied and strict proof thereof demanded at the time of trial if the same be deemed material.

36. Denied. Defendant has no right to equitable relief and, therefore, any remedy which he may have is at law.

Count III

37. The answers to Paragraphs 1 - 25, and 27 -35, are incorporated herein by reference.

38. Knowledge of the allegations upon which Paragraph 38 is based is within the exclusive control of the Plaintiff. Therefore, Defendant, being without knowledge, denies the same and demands strict proof at the time of trial if the same be deemed material.

39. Knowledge of the allegations upon which Paragraph 39 is based is within the exclusive control of the Plaintiff. Therefore, Defendant, being without knowledge thereof, denies the same and demands strict proof at the time of trial if the same be deemed material.

40. Knowledge of the allegations upon which Paragraph 40 is based is within the exclusive control of the Plaintiff. Therefore, Defendant, being without knowledge, denies the same and demands strict proof at the time of trial if the same be deemed material.

NEW MATTER

* * * * * *

[NOT PRINTED IN THIS APPENDIX]

* * * * * *

WHEREFORE, Defendant demands that Plaintiff's Complaint be dismissed at Plaintiff's sole cost and expense.

BERKMAN RUSLANDER POHL LIEBER & ENGEL

By /s/ ROBERT ENGEL
Robert Engel

/s/ MARCUS AARON II
Marcus Aaron II

/s/ ALAN A . GARFINKEL
Alan A. Garfinkel

Attorneys for Montefiore Hospital Association of Western Pennsylvania, Defendant.

[EXHIBITS TO ANSWER AND NEW MATTER NOT PRINTED]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
Civil Division

LAWRENCE N. ADLER,
Plaintiff

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA,
Defendant

APPEARANCE DOCKET

No. 1501 July Term, 1970.
In Equity

Issue No. 76385

STIPULATION OF FACTS

It is stipulated by and between the parties as follows:

1. The facts set forth herein are for purposes of this lawsuit only admitted to be true and correct. Copies of all documents identified and attached to this Stipulation are admitted to be true and correct copies of the originals.

2. Counsel for each party reserves the right to object to the relevancy or materiality of any of the facts admitted or documents identified.

3. Plaintiff, LAWRENCE N. ADLER, (hereinafter "ADLER") is an individual residing at Woodland Manor, Pittsburgh, Allegheny County, Pennsylvania.

4. Defendant, THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, (hereinafter referred to as "MONTEFIORE HOSPITAL") is a non-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania and operates the MONTEFIORE HOSPITAL at Fifth Avenue at Darragh, Pittsburgh, Allegheny County, Pennsylvania.

5. ADLER received the degree of Doctor of Medicine from the University of Pittsburgh Medical School in 1957. He interned at Montefiore Hospital during the year 1957-58. He served a residency in Internal Medicine at the University of Pittsburgh Medical Center - Presbyterian University Hospital in the year 1958-60. He served a residency in Cardiology at Mount Sinai Hospital, New York City for the year 1960-61. He was a Research Fellow in Cardiology at Thorndike Memorial Laboratory and Harvard Medical Unit, Boston City Hospital and the Department of Medicine, Harvard Medical School during the years 1961-63.

6. At all times relevant, ADLER has been licensed to practice medicine in the Commonwealth of Pennsylvania. On April 3, 1964, ADLER was certified by the American Board of Internal Medicine. On October 11, 1969, ADLER was certified by the American Board of Internal Medicine, with a sub-specialty in cardiovascular diseases.

7. ADLER was an instructor in medicine at the University of Pittsburgh School of Medicine from 1963-66 and has been a clinical assistant professor in medicine from 1966 to present. ADLER has published medical articles dealing with the subject of Cardiology set forth in Exhibit "1" to this Stipulation. ADLER is the President-Elect of the Western Pennsylvania Heart Association.

8. The MONTEFIORE HOSPITAL, which is regulated by the Commonwealth of Pennsylvania, was established for the purpose of providing comprehensive programs of health care to patients and for the promotion of medical, dental and health education and research. Since 1957, MONTEFIORE HOSPITAL has actively participated in the activities of the University of Pittsburgh School of Medicine. For the purposes of promoting better patient care, education and research, MONTEFIORE

HOSPITAL on December 11, 1969, entered into an Agreement of Affiliation with the University of Pittsburgh, under which MONTEFIORE HOSPITAL became affiliated with the Schools of Medicine, Dental Medicine, Nursing, Health Related Professions and Pharmacy and the Graduate School of Public Health of the University of Pittsburgh, a state-related university, receiving funds from the United States government and from the Commonwealth of Pennsylvania. On December 11, 1969, MONTEFIORE HOSPITAL also became a formal corporate member of the University Health Center. A copy of the Agreement of Affiliation is attached hereto and marked Exhibit "2".

9. By reason of the affiliation with a state-related university and the financial support from the Commonwealth of Pennsylvania and the Federal Government, MONTEFIORE HOSPITAL is a public institution and the conduct and actions of MONTEFIORE HOSPITAL are "state actions" within the scope of the Fourteenth Amendment to the Constitution of the United States.

10. Attached hereto and marked Exhibit "3" is a copy of the By-laws of the Medical Staff of MONTEFIORE HOSPITAL in effect as of the date of the commencement of this lawsuit.

11. From July 16, 1963, until July 1, 1969, MONTEFIORE HOSPITAL employed ADLER on a part-time basis as the salaried Director of MONTEFIORE HOSPITAL'S Cardiac Catheterization Laboratory (hereinafter referred to as the "LABORATORY"). Attached hereto and marked Exhibit "4" is a copy of a Memorandum of July 20, 1963, from Mr. Irwin Goldberg, Executive Director of MONTEFIORE HOSPITAL to ADLER.

12. On July 16, 1963, ADLER'S salary was $625.00 per month or at an annual rate of $7,200.00. On April 1, 1966, ADLER'S salary as Director of the LABORATORY was

increased to $8,000.00 per annum; a further increase was granted on September 1, 1968 to $10,000.00 per annum.

13. In July, 1963, contemporaneously with his employment by MONTEFIORE HOSPITAL, ADLER was given a temporary appointment as a Junior Assistant on the Active Medical Staff of the Department of Medicine of MONTEFIORE HOSPITAL. In December, 1963, ADLER was appointed as a Junior Assistant on the Active Medical Staff of the Department of Medicine for the year 1964. Thereafter, ADLER was promoted to Senior Assistant on the Active Medical Staff of the Department of Medicine for the year 1965 and has continued that capacity to the present time.

ADLER was given written notice of said appointments for the years 1964 through 1968 and for 1970 was advised orally, along with all other physicians on MONTEFIORE HOSPITAL'S staff that his staff appointment was continued and that the absence of written notification for the year 1969 did not alter or diminish his status as a Senior Assistant on the Active Medical Staff of the Department of Medicine. A copy of ADLER'S application for staff appointment is attached hereto and marked as Exhibit "5". Copies of ADLER'S letters of appointment for the years 1964 through 1968 and 1970 are attached hereto and marked Exhibit "6".

14. ADLER has experience in performing left and right heart catheterizations and installing temporary and permanent pacemakers and performing coronary arteriograms, angiocardiograms, aortograms and the other specialized procedures performed in the Cardiac Catheterization (or Cardiovascular Laboratory) of MONTEFIORE HOSPITAL during the years 1963 through July, 1969.

15. ADLER is fully qualified to perform all of the procedures set forth in paragraph 14 above.

16. With the exception of cardioversions, and the installation of temporary and permanent pacemakers, all of the procedures performed in the LABORATORY are diagnostic in nature.

17. For the six-year period that ADLER was Director of the LABORATORY, ADLER was the only cardiologist who performed the procedures set forth in paragraph 14 above in the LABORATORY (except in cases of emergency) both on his own patients and patients referred to the LABORATORY or to ADLER by other physicians and cardiologists.

18. Prior to 1967, no member of the Medical Staff, other than ADLER, had requested permission to perform procedures in the LABORATORY.

19. On June 30, 1966, ADLER and MONTEFIORE HOSPITAL executed the assignment attached hereto as Exhibit "7".

20. During the years 1963 through 1969, ADLER, with the knowledge and consent of the MONTEFIORE HOSPITAL, engaged in the private practice of medicine specializing in cardiology. He is associated with a medical group having offices in Forest Hills, Pennsylvania, and is in partnership with Dr. Seymour Krause with offices in the Oakland area of the city of Pittsburgh. During the years 1963 through 1969, ADLER admitted numerous private patients of his to MONTEFIORE HOSPITAL.

21. ADLER is a member of the staff of Braddock General Hospital, is a Cardiac Consultant at Homestead Hospital and is on the staff of Presbyterian University Hospital, in addition to MONTEFIORE HOSPITAL.

22. Braddock General Hospital and Homestead Hospital do not have Cardiac Catheterization Laboratories or facilities

for performing Cardiac Catheterizations, for installing permanent pacemakers, for performing coronary arteriograms or aortograms. Presbyterian University Hospital does have three Cardiac Catheterization Laboratories.

23. ADLER'S medical associates are members of the staffs of Homestead Hospital, Braddock General Hospital and MONTEFIORE HOSPITAL and patients of their practice are regularly admitted to these hospitals.

24. In January, 1967, Dr. Albert Treger was appointed to the Active Medical Staff of MONTEFIORE HOSPITAL. Dr. Treger was a qualified cardiologist with extensive experience in cardiac catheterization work. Dr. Julian Levinson, with whom Dr. Treger was associated in the private practice of medicine, orally requested that Dr. Treger be permitted to perform cardiac catheterization procedures in the LABORATORY. Dr. Levinson was informed by Dr. Philip Troen, Physician-in-Chief at MONTEFIORE HOSPITAL, that the Hospital had an established policy limiting the performance of cardiac catheterization procedures to the Director of the LABORATORY and for that reason Dr. Treger's request was denied.

25. While Dr. Seymour Krause was employed and salaried on a part-time basis by MONTEFIORE HOSPITAL to read and interpret electrocardiograms, only Dr. Krause was permitted to make entries on the patient's EKG chart as to the interpretation of said electrocardiograms regardless of the fact that the patient's own physician was a qualified cardiologist on the staff of MONTEFIORE HOSPITAL.

26. While Dr. Seymour Krause was employed by MONTEFIORE HOSPITAL to read and interpret electrocardiograms, he did not bill patients for this service to the knowledge of ADLER or MONTEFIORE HOSPITAL.

27. At the present time, only the cardiologists employed and salaried by MONTEFIORE HOSPITAL to read and interpret electrocardiograms may make entries on the patient's EKG chart as to the interpretation of said electrocardiograms, regardless of the fact that the patient's own physician is a qualified cardiologist on the staff of MONTEFIORE HOSPITAL.

28. While employed as Director of the LABORATORY, ADLER, by virtue of the authority vested in him as Director, established a policy that for the welfare of the patient, the Director of the LABORATORY and a thoracic surgeon would participate in the installation of permanent pacemakers.

29. During the four-month period, in the fall of 1968, when the LABORATORY was being remodeled, all LABORATORY procedures were performed in the adjacent X-ray laboratories.

30. Since January 1, 1968, the salaried physicians employed by MONTEFIORE HOSPITAL to be in charge of the Coronary Care Unit on a rotating monthly basis, have been authorized to insert temporary pacemakers only during the months the individual physician is in charge of the Coronary Care Unit.

31. In April, 1969, MONTEFIORE HOSPITAL informed ADLER that his employment as Director of the LABORATORY was terminated as of July 1, 1969.

32. On July 1, 1969, ADLER'S employment as Director of the LABORATORY was terminated and Dr. Edward Curtiss was employed by MONTEFIORE HOSPITAL on a full-time basis as Director of the LABORATORY.

33. From July 1, 1969, to the present (with the exception of the installation of temporary pacemakers which was

permitted by virtue of his employment in the Coronary Care Unit) ADLER has not been permitted to perform any of the procedures which he had theretofore performed while Director of the LABORATORY of MONTEFIORE HOSPITAL.

34. From July 1, 1969, until March 1, 1970, ADLER was employed by MONTEFIORE HOSPITAL on a part-time basis as Chief of MONTEFIORE HOSPITAL'S Coronary Care Unit at the same salary ADLER received as Director of the LABORATORY.

35. MONTEFIORE HOSPITAL had the right to employ a full-time cardiologist as Director of the LABORATORY to perform procedures in said LABORATORY.

36. MONTEFIORE HOSPITAL had the right to discharge ADLER as an employee.

37. Since July 1, 1969, MONTEFIORE HOSPITAL has continued the established policy and practice that all LABORATORY procedures, including catheterizations, would be performed by Dr. Edward Curtiss, the full-time Director of the LABORATORY, except (1) in case of emergency; and (2) that the salaried physicians employed by MONTEFIORE HOSPITAL to be in charge of the Coronary Care Unit on a rotating monthly basis could insert temporary pacemakers and perform cardioversions on patients in the unit only during the months the individual physician is in charge of the Coronary Care Unit.

38. On March 20, 1970, Dr. Philip Troen wrote a letter to Alvin Rogal, Chairman of the Joint Conference Committee of MONTEFIORE HOSPITAL. A true and correct copy of Dr. Troen's letter is attached hereto as Exhibit "8".

39. At the present time, only the full-time salaried physicians employed by the MONTEFIORE HOSPITAL in the

Nuclear Medicine Unit are permitted to use those facilities although there are other similarly qualified physicians on the Active Medical Staff.

40. Since July 1, 1969, ADLER has referred 27 patients to hospitals other than MONTEFIORE HOSPITAL for procedures to be performed in their Cardiac Catheterization Laboratories although Dr. Edward Curtiss, present Director of the MONTEFIORE HOSPITAL LABORATORY, was qualified to do all or most of the procedures involved.

41. Seventeen of the said 27 patients referred to hospitals other than MONTEFIORE HOSPITAL for procedures to be performed in their Cardiac Catheterization Laboratories were referred by ADLER to Presbyterian University Hospital.

42. ADLER is presently not permitted to perform procedures in the Cardiac Catheterization Laboratories at Presbyterian University Hospital.

43. ADLER did not perform any of the procedures in the Cardiac Catheterization Laboratories at hospitals other than MONTEFIORE HOSPITAL for the patients that he referred to said hospitals.

44. The following is a list of the physicians presently on the Cardiovascular Service of MONTEFIORE HOSPITAL:

Philip Brostoff (Chief)	Louis Landay (Emeritus)
Seymour Krause	Marvin Silverblatt
Lawrence Adler	Stanley Silverblatt
Julian Levinson	Irving L. Stutz (Emeritus)
John D. Kyriacopoulos	Edward Curtiss
Albert Treger	Barry Harris

45. Dr. Mark Ravitch and Dr. Felix Steichen are full-time salaried surgeons at MONTEFIORE HOSPITAL and have been

on the staff since July, 1969. Both Dr. Ravitch and Dr. Steichen are qualified thoracic surgeons.

46. MONTEFIORE HOSPITAL is accredited by the Joint Committee on Accreditation of Hospitals. A true and correct copy of the current standards of the Joint Committee on Accreditation of Hospitals with respect to staff membership and staff privileges is attached hereto as Exhibit "9".

KAUFMAN & KAUFMAN

By /s/ FRANCES O. TENNANT
Attorneys for Plaintiff

BERKMAN RUSLANDER POHL LIEBER & ENGEL

By /s/ ROBERT ENGEL
Robert Engel

/s/ MARCUS AARON II
Marcus Aaron II

/s/ ALAN A. GARFINKEL
Alan A. Garfinkel
Attorneys for Defendant

[EXHIBITS TO STIPULATION OF FACTS NOT PRINTED]

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PREME COURT, U. S.

73-749

Supreme Court, U. S.
FILED
DEC 7 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 749

LAWRENCE N. ADLER, Petitioner

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

NO. 749

LAWRENCE N. ADLER, Petitioner

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The Respondent, The Montefiore Hospital Association of Western Pennsylvania, respectfully prays that the petition for a writ of certiorari to review the opinion and judgment of the Supreme Court of Pennsylvania entered in this proceeding on July 2, 1973, be denied.

JURISDICTION

Respondent and Petitioner stipulated in the state courts that by reason of Respondent's affiliation with a state-related university and financial support from the Commonwealth of Pennsylvania and the Federal Government, it was a public institution whose actions and conduct were "state actions" within the meaning of the Fourteenth Amendment.

While Respondent does not wish to denigrate that to which it voluntarily agreed, it nevertheless harbors grave reservations about the ability to stipulate to the jurisdiction of this constitutional Court and is especially mindful of this Court's statement in *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962) that "the mere consent of the parties to the Court's consideration and decision of the case cannot, by itself, confer jurisdiction on the Court."

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. May an advanced university-affiliated teaching hospital deny the use of its cardiac catheterization laboratory without a hearing to a staff cardiologist whom it formerly employed as part-time director of the laboratory and who now seeks to use the laboratory solely in his private capacity without denying substantive or procedural due process or equal protection of the laws when:

A) The right of the hospital to terminate his employment and hire a full-time director is admitted;

B) The cardiologist, during his tenure initiated, advocated and supported the hospital's policy of excluding all other cardiologists but the director from performing procedures in the laboratory;

C) The policy of the hospital in limiting the performance of procedures in its laboratory to the employed, full-time cardiologist is based upon considerations of improved patient care, promotion of good teaching and sound hospital administration;

D) The cardiologist has not had his privileges of staff membership reduced; and,

E) The cardiologist retains the right to treat his patients in the hospital on the same basis as other staff cardiologists?

(Answered in the affirmative by the Court below)

2. Are the constitutional rights of a patient infringed by a hospital regulation limiting the performance of procedures in its laboratory to the full-time director of that laboratory?

(Answered in the negative by the Court below)

COUNTERSTATEMENT OF THE CASE

Introduction

This is an action in equity instituted in the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, in which Petitioner, a former employee of the Respondent Hospital, sought to compel the Hospital to permit him to use expensive, intricate and technical facilities of its Cardiac Catheterization Laboratory (hereinafter referred to as the "Laboratory"), for his own personal use and profit, which facilities he had previously been employed to direct and operate, on an exclusive basis, for the Hospital.

Petitioner in this action is now asking this Honorable Court to ignore the carefully considered opinions of the Chancellor and the Pennsylvania Supreme Court and substitute its judgment for that of the Hospital's Board of Trustees and its duly designated agents to overturn a rule which Petitioner himself instituted, encouraged and supported and which operated for his benefit during his years as an employee. Now admitting the Hospital's right to terminate his employment and replace him with another physician, Petitioner suddenly finds those same rules with which he lived for so many years, benefiting him and excluding others, to be somehow fraught with constitutional difficulties.

Procedural Background

On May 28, 1970, Petitioner's motion for a preliminary injunction was denied. (Appendix C. 31a) After extensive discovery, trial was held on Petitioner's request for a permanent injunction. On September 13, 1971, the Court of Common Pleas, Judge Frank R. Bolte, Chancellor, filed an adjudication which contained 55 findings of fact, 13 conclusions of law, a clear statement of the issues, and a well-reasoned discussion thereof. (Appendix D. 32a-67a) On the same date, the Court entered a Decree Nisi (Appendix D. 68a-69a) which denied Petitioner's request for a permanent injunction. Petitioner filed 62 exceptions to the adjudication and Decree Nisi (R. 1662a-1676a)* On December 10, 1971, the Court *en banc*, Bolte and McKenna J.J., filed an opinion (Appendix E. 70a-79a) and entered an order dismissing Petitioner's exceptions, affirming the adjudication and Decree Nisi and entered judgment for the Respondent. An appeal then followed to the Supreme Court of Pennsylvania which after an exhaustive review of the record sustained the decision of the lower court. (Appendix A. 1a-21a)

The trial court heard extensive testimony at both the preliminary and final hearings. It received into evidence the depositions in the case and was aided by a lengthy Stipulation of Facts. (Appendix F. 98a-107a) Also, the Court received into evidence, by stipulation of counsel, the reports of six internationally recognized experts on the subject of cardiac catheterization (R. 343a; 1313a-1336a; 1349a-1356a; 1363a-1368a), as well as the report of Dr. Donald N. Medearis, Jr., the Dean of the Medical School of the University of Pittsburgh. (R. 1326a-1332a)

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*"R." indicates references to the printed record in the Supreme Court of Pennsylvania not printed in Petitioner's Appendix.

As noted in the opinion of the Court *en banc*, (Appendix E. 72a) Petitioner abandoned all of his specific exceptions to the 55 Findings of Fact in the Chancellor's Adjudication, all of which findings were amply documented by references to the record.

The abbreviated factual background presented by Petitioner ignores the record, glosses over essential facts stipulated by the parties and found by the Court below. Thus, to put the matter in proper prospective, a fuller statement is necessary.

Facts

Petitioner is a practicing cardiologist on the Active Medical Staff of Montefiore Hospital as well as three other Pittsburgh area hospitals. Additionally he maintains private offices at two widely separated locations in the Greater Pittsburgh area. (Stipulations of Fact, Nos. 13, 20, 21, Appendix F. 101a, 102a; Finding of Fact No. 1, Appendix D. 34a)

Respondent, Montefiore Hospital Association of Western Pennsylvania, is a Pennsylvania nonprofit corporation which operates the Montefiore Hospital in Pittsburgh. (Stipulation of Fact No. 4, Appendix F 98a; Finding of Fact No. 2, Appendix D. 34a)

Since 1957 Respondent Hospital has actively participated in the activities of the University of Pittsburgh School of Medicine. In December, 1969, Respondent became affiliated with the University's School of Medicine and other related schools in the health professions. It also became a Corporate member of the University Health Center. (Stipulation of Fact No. 8, Appendix F. 99a, 100a; Findings of Fact No. 4, Appendix D. 35a)

Respondent is presently organized on a departmental basis, with each of the departments of Medicine, Surgery, Radiology, Anesthesiology and Pathology having its own full-time chief physician. According to the By-Laws, Rules and Regulations of the medical staff of Respondent Hospital, the respective departmental chiefs have the responsibility for and authority over the administration, organization and conduct of all departmental activities throughout the Hospital. The Division of Cardiology and its laboratory are within the Department of Medicine. (Defendant's Final Hearing Exhibit B; Finding of Fact No. 5, Appendix D. 35a)

From July 16, 1963, until July 1, 1969, Petitioner was employed as the part-time salaried director of Respondent's Cardiac Catheterization Laboratory. (Stipulation of Fact No. 11, Appendix F. 100a; Finding of Fact No. 6, Appendix D. 35a) In his capacity as director, Petitioner performed all the intricate and risky procedures including Cardiac Catheterizations.* (Stipulation of Fact No. 14, Appendix F. 101a; Finding of Fact No. 15, Appendix D. 38a)

With the exception of cardioversions (which were performed by other cardiologists) and the installation of temporary and permanent pacemakers, all procedures performed in the Laboratory are diagnostic in nature. (Stipulation of Fact No. 16, Appendix F. 102a)

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*Cardiac Catheterization involves the threading of a catheter through a patient's vein or artery into the heart in order to measure pressures. The placement of the catheter into the heart is done under fluoroscopic or image amplification control. Cineangiography is usually combined with catheterization and consists of injecting a contrast substance or material into an artery or cardiac chamber for the purpose of defining its anatomy and detecting organic difficulties. When the contrast material is injected, the image is recorded on X-ray movies or single X-ray film. Coronary arteriography is usually combined with left heart catheterization and involves the placement of a catheter into an artery, the injection of contrast material through the catheter, and the attempt to detect abnormal arterial conditions or deterioration. (Finding of Fact No. 9, Appendix D. 37a)

Concededly complex, cardiac catheterizations and related procedures are essentially team functions requiring such personnel as technicians and nurses in addition to the physician. (Finding of Fact No. 10, Appendix D. 37a)

The risks of potential complications from these procedures are varied, all stemming from the invasion of a foreign body into the coronary chambers, and the effect of the generalized procedure upon the patient.* There is agreement among members of the medical profession that considerable risk is involved although the exact magnitude is subject to some difference of opinion. Because of potential complications, there is a need for monitoring and close observation for several hours after the conclusion of the procedure. (Finding of Fact No. 11, Appendix D. 37a)

Except in cases of emergency, Petitioner as Respondent's employee-Director of the Laboratory, was the only cardiologist on Respondent's staff who performed cardiac catheterizations and related procedures both on his own patients and on patients referred to the Laboratory by other physicians even though there were four other cardiologists on the staff of Respondent Hospital who were capable of performing these techniques. (Stipulation of Fact No. 17, Appendix F. 102a; Findings of Fact Nos. 17, 18, Appendix D. 38a-39a)

In 1967 when another qualified staff cardiologist requested permission to perform these procedures, the request was refused on Petitioner's recommendation. Petitioner's reasoning, still valid today, was that physician competence

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*Death, serious arrythmias, profound hypotension, complications involving the arterial system, accidental perforation of the heart, serious infections, bleeding and allergic reactions, embolisms, and cardiac complications are some of the major complications which can arise as a result of cardiac catheterizations and related procedures. (Finding of Fact No. 12, Appendix D. 38a)

can be maintained only by the performance of three cardiac catheterizations per week, and in a low volume laboratory such as Respondent's, this can be assured only by restricting performance to the full-time director. (R. 560a. 561a, 572a-575a, 1400a, 1401a)

Contemporaneously with Petitioner's employment by Respondent, he was appointed to the Active Medical Staff of its Department of Medicine and continues to be a member thereof, with all the rights and privileges accorded to every other physician on the staff. (Stipulation of Fact No. 13, Appendix F. 101a; Finding of Fact No. 7, Appendix D. 36a)

Petitioner had a dual relationship with Respondent during his tenure as Laboratory Director. First, as Director, Petitioner was a part-time employee performing cardiac catheterizations and related procedures and administering the affairs of that unit. Second, he was a cardiologist engaged in private practice on the Active Medical Staff with all privileges attendant thereto. However, it was understood that his employment as Director and compensation therefore were separate and distinct from his privileges and private practice as a Staff Physician. (Finding of Fact No. 8, Appendix D. 36a-37a)

In April, 1969, Petitioner was notified that his part-time employment would be terminated on July 1, 1969 when a full-time Director would assume responsibility for the Laboratory. (Stipulations of Fact Nos. 31, 32, Appendix F. 104a; Findings of Fact Nos. 41, 42, Appendix D. 47a, 48a) It was conceded in the lower court that Respondent had the right to discharge Petitioner and hire a full-time cardiologist to perform procedures in the Laboratory. (Stipulation of Fact No. 36, Appendix F. 105a; Finding of Fact No. 44, Appendix D. 48a; Stipulation of Fact No. 35, Appendix F. 105a; Finding of Fact No. 43, Appendix D. 48a)

The establishment of the Laboratory in 1963, its subsequent expansion, and finally its restructuring on a full-time basis in 1969 were part of the evolution of Respondent from a community hospital to a major teaching institution responsible for the training of medical students of the University of Pittsburgh's School of Medicine. (Finding of Fact No. 22, Appendix D. 40a) Contemporaneously with these changes, many of the physicians employed on a part-time basis to direct the specialty units or laboratories such as the Thyroid and Nuclear Medicine Unit, the Gastroenterology Unit and Renal Unit were replaced with full-time physicians. After the part-time employees were replaced, they were no longer permitted to perform the specialized procedures pertaining to their units, even though they continued to be fully qualified to do so. (Findings of Fact Nos. 38, 19, Appendix D. 46a, 47a)

Under the full-time Director of the Laboratory, the policy of limiting performance of procedures to the Director which had been established and maintained during Petitioner's tenure, was continued. (Stipulation of Fact No. 37, Appendix F. 105a; Finding of Fact No. 47, Appendix D. 48a-49a) This policy, though now operating to exclude Petitioner, is an accepted hospital practice in major University-affiliated teaching hospitals and is amply justified by considerations of patient care, teaching and efficient hospital administration, all of which are delineated in the adjudication, (Findings of Fact Nos. 48-50, Appendix D. 49a-52a) and in the opinion of the Supreme Court of Pennsylvania. (Appendix A. 6a)

At the termination of his Laboratory Directorship, Petitioner became the salaried part-time chief of Respondent's Coronary Care Unit where he exercised a similar type of exclusive authority. (Finding of Fact No. 47, Appendix D. 48a-49a) He was so employed until March 1, 1970, when he was relieved of that responsibility for failure to follow the

rules, attempts to subvert the system by performing Laboratory procedures in unauthorized places and at unauthorized times, failure to fulfill his teaching commitments and failure to return expensive hospital equipment he had removed from the premises. (Transcript of Final Hearing, R. 527a-529a; Defendant's Final Hearing Exhibits C, D, E.; Finding of Fact No. 45, Appendix D. 48a)

Petitioner waited eight months before requesting a hearing before the Joint Conference Committee of the Hospital, which request for the first time alleged a reduction of privileges. Moreover, Petitioner did not question his inability to perform procedures in the Laboratory until well after his employment as Director of the Coronary Care Unit was in jeopardy. (Finding of Fact No. 55, Appendix D. 52a) This request for a hearing was denied on grounds that his right to perform procedures was solely an incident of his prior employment and not of his Staff membership, and involved no deprivation of any staff privileges possessed by Respondent or any other cardiologist on the Staff. (R. 594a 595a; Plaintiff's Preliminary Hearing Exhibits 6, 7, 8; Findings of Fact Nos. 51-53, Appendix D. 52a)

REASONS FOR DENYING THE WRIT

Summary of Argument

The policy of a university-affiliated, advanced teaching Hospital limiting the performance of procedures in its Cardiac Catheterization Laboratory to the full-time Director employed by the Hospital does not violate the substantive requirements of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Substantial and undisputed evidence demonstrated that this policy, which represents a delicate balancing of the interests of patients, doctors and medical students, improves patient care, promotes better teaching and more efficient administration.

The laboratory procedures in question, much like X-ray procedures, represent only a small segment of Petitioner's cardiology practice, are diagnostic in nature and in no way infringe on either the physician's right to prescribe for and treat his patient or the concomitant right of the patient to be treated by a physician of his choice.

There has been no deprivation of procedural Due Process. During the time Petitioner was employed part-time as Director of Respondent's Laboratory, he established and maintained the challenged policy. Petitioner's right to perform these procedures was based on this employment relationship. Petitioner has conceded that the Hospital had the right to terminate this employment and to hire a full-time Director. The Hospital was not required to grant Petitioner a hearing on its refusal to permit Petitioner to perform these procedures in its Laboratory since it had not deprived Petitioner of any right or privilege which he held other than in his capacity as an employee.

There has likewise been no deprivation of equal protection of the laws. Petitioner previously had a marked advantage over the other cardiologists on Respondent's staff by reason of his dual employee-staff status. He is in fact more equal than before, now being treated exactly like all other non-employee cardiologists whom he had previously excluded from the Laboratory. Petitioner's attempt to equate his position with surgeons was demonstrated to be inappropriate and certainly does not rise to the level of a constitutional issue. It also ignores the equality of his position with other former part-time heads of Respondent's specialty units who have similarly been replaced by full-time employees.

The Supreme Court of Pennsylvania exhaustively reviewed the findings of fact and conclusions of law of the Chancellor and Court *en banc* and clearly, completely and correctly dealt with the issues raised in this proceeding.

Argument

I. THERE IS NO VIOLATION IN THIS CASE OF THE SUBSTANTIVE OR PROCEDURAL REQUIREMENTS OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

The narrow issue presented to and decided by the Supreme Court of Pennsylvania was

> ". . . whether a private physician associated with a public teaching hospital is entitled to render what he considers comprehensive medical treatment to his patients by use of certain hospital facilities and equipment, or whether his claimed right to do so must yield to rules and regulations established by the hospital for its own effective administration and which forbid such use." 453 Pa. 60, 62 (Appendix A. 1a)

Petitioner is inaccurate in asserting at page 12 of his petition that the Supreme Court of Pennsylvania failed to recognize that a physician's right to practice his profession was a fundamental right deserving of protection. Petitioner's argument assumes that his right is absolute while both the trial court and the Pennsylvania Supreme Court recognized the equally important complex obligations and responsibilities of the Respondent in the total scheme of providing the best in patient care, teaching and administration (Appendix A. 13a) The Court further recognized that the performance of procedures within a cardiology laboratory, being essentially diagnostic in nature, does not interfere with the right of the physician to prescribe for and treat his patient. Although the laboratory procedures are performed only by the Director, the physician-staff member in the final analysis controls what is to be done, the interpretation of the tests and the treatment.

This Court adumbrated the perimeters of permissible occupational regulation in *Meyer v. Nebraska*, 262 U.S. 390 (1923) in which it was held that the right to engage in any of the common occupations of life was a liberty which "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S. at 399, 400.

Petitioner's contentions were correctly viewed as a challenge of the means by which Respondent attempts to fulfill its function as a public teaching hospital. Any proper adjudication would therefore have had to concern itself with measurements of arbitrariness, real and substantial relationship and overbreath, which the opinions rendered properly did.

The determination made below was that the Hospital's regulation was a reasonable means of achieving the legitimate ends of providing optimal patient care, academic excellence in its teaching program and efficient internal administration. (Appendix A. 13a)

Based on voluminous expert testimony the lower Court found the challenged policy helped to achieve this tripartite objective in the following ways: (1) as the procedures are essentially team functions, the members are able to develop a routine as well as a familiarity with the equipment and its utilization by a particular physician; (2) full-time presence at the Hospital by the operator permits optimal patient care because complications can be treated by the physician who performed the procedure; (3) physician competence can be maintained only by the performance of at least three cardiac catheterizations per week, and in a low volume laboratory such as Respondent's this can be assured only by restricting performance to the full-time Director; (4) a full-time physician-director has the extra time necessary to teach effectively

the many medical students, interns and residents who utilize the Laboratory as a basic learning tool; (5) scheduling problems are reduced when it is not necessary to attempt to accommodate practitioners on the staff who have outside commitments; (6) procedures should be scheduled when possible in the morning so that the performing physician can be available in the afternoon should complications arise; (7) a full-time director insures that the non-professional but essential administrative details of operating a laboratory will be performed by a physician; were the director's volume of procedures reduced by allowing others to perform them, it would be extremely difficult to obtain a qualified cardiologist willing to assume the administrative functions; (8) equipment breakdowns and lack of reliability are minimized by limiting equipment utilization to a single physician; and (9) Respondent has a substantial and legitimate interest in insuring the optimal performance of its employees and use of equipment because it is liable for negligently caused injuries. (Appendix D. 50a-52a; Appendix A. 6a)

In the loose conglomeration of generalities addressed to this Court it is difficult to determine precisely what quarrel meriting this Court's consideration Petitioner has with the Supreme Court of Pennsylvania's treatment of the substantive due process issue other than the fact that the Court did not sustain his position.

In Respondent's view, either the Petitioner is asserting that his right to practice medicine is absolute in the sense that it cannot be circumscribed by any restriction, however reasonable, or he wishes this Court to substitute its judgment concerning policy and good practice for that of the hospital administrators.

The former position does not comport with the doctrine of the *Meyer* case, supra, and is untenable. By urging this Court to embrace the latter position, Petitioner would

"regrettably hark back to the heyday of substantive due process." *Eisenstadt v. Baird*, 405 U.S. 438, 467 (1972) (dissenting opinion of Burger, C.J.) and resurrect decisions such as *Lochner v. New York*, 198 U.S. 45 (1905) and *Nebbia v. New York*, 291 U.S. 502 (1934) in which the Court evinced willingness to substitute its judgment for that of the duly constituted federal and state legislatures and public authorities.

Petitioner's claim that he was denied procedural due process by the Hospital's refusal to accede to his request for a hearing is equally without merit.

The prior authority to perform these procedures stemmed solely from Petitioner's employment position and not from his membership on the medical staff of the Cardiology Department. In point of fact, except for emergencies, no cardiologist other than the director has ever held privileges in the Laboratory. (Stipulations of Fact Nos. 17, 37 Appendix F. 102a, 105a; Findings of Fact Nos. 17, 18, 46, 47, Appendix D. 38a, 39a, 48a, 49a)

In its recent decision of *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972) this Court, confronted with a similar due process claim of a non-tenured college professor who had been denied re-employment for the following year, said in pertinent part:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits . . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created

> and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits . . . ." 408 U.S. at 576-577.

As the Pennsylvania Supreme Court correctly pointed out, Petitioner's rights to admit patients, to prescribe treatment, and indeed the full range of privileges accorded to all staff members have in no way been diminished, but remain in all respects equal to those of other staff members. Hence the claim of a denial of procedural due process is based on nothing more than a "unilateral expectation". (Appendix A. 20a)

Moreover Respondent's By-laws do not sustain the alleged claim of right to a hearing. Subsection I of Article III, Section V of the Medical Staff By-laws reads:

> "In any case where reappointment is not recommended or where reduction of privileges is recommended the Executive Director shall notify the physician or dentist concerned and he shall be given an opportunity to appear before the Joint Conference Committee." (Exhibit 3 to Stipulation of Fact No. 10 Appendix A. 20a)

With respect to his employment, there was no reason for a hearing since Petitioner stipulated and agreed that not only did Respondent have a right to hire a full-time Director of the Laboratory but also that Respondent had an unqualified right to terminate Petitioner's part-time employment. (Stipulations of Fact Nos. 35, 36; Appendix F. 105a)

Since staff privileges had not been reduced nor reappointment denied, a hearing before the Joint Conference Committee was not mandated, due process was not denied, nor any constitutional right of Petitioner violated.

II. RESPONDENT'S POLICY OF LIMITING THE USE OF ITS LABORATORY TO THE FULL-TIME DIRECTOR DOES NOT DENY PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

Petitioner's second argument asserts that the Hospital's policy of restricting the access of staff cardiologists to the cardiac catheterization laboratory while permitting staff surgeons unlimited use of the operating rooms violates the Equal Protection Clause of the Fourteenth Amendment.

This contention rests on what Respondent amply demonstrated was a fallacious analogy between the performance of cardiac catheterizations and general surgical procedures. As noted in the opinion of the Supreme Court of Pennsylvania, the report of Dr. Richard Gorlen, Chief of the Cardiovascular Division at Peter Bent Brigham Hospital, Boston and Associate Professor of Medicine at Harvard Medical School introduced at trial stated:

> "An analogy is often erroneously made with a surgical operating team: during general surgery, however, the number of maneuvers are stylized and set for each team member such as Operating Nurse and apply to all participating doctors. In a catheterization laboratory the number of technicians, nurses, etc. is multiple and varying in applications – doctor idiosyncrasy is greater including type of equipment and its operation, modes of physiological measurement or of angiographic data retrieval. Furthermore, patient crises are manifold running the gamut from pain and discomfort to cardiac arrest and death." (Appendix A. 18a)

Dr. James Leonard, Professor of Medicine at the University of Pittsburgh Medical School and Chief of Cardiology at Presbyterian-University Hospital, also debunked this comparison. At trial of the issue Dr. Leonard stated:

> ". . . the tradition of what goes on in abdominal surgery, let's say, in terms of the structures and functions of the operating room versus the cardiac catheterization laboratory are entirely different . . . . the key to successful surgery would be the surgeon himself . . . The skill of the operator in a cardiac catheterization laboratory is only one small segment . . . of the entire need of a successful diagnostic catheterization laboratory." (R. 641a-642a)

In *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) this Court said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Accepting the fact that when classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972), the differentiation inherent in the Hospital's policy still passes constitutional muster because the means selected were necessary to and substantially furthered legitimate and important purposes. The same impelling reasons which caused Respondent to adopt this policy simply do not obtain in the case of surgeons.

Petitioner also conveniently overlooks the fact that his situation more closely parallels the circumstance of other

former part-time heads of Respondent's specialty units, all of whom were exclusive in their domains, and all of whom, like Petitioner, were excluded after being replaced by full-time employees. (Findings of Fact Nos. 38, 39, Appendix D. 46a, 47a) Petitioner makes no complaint about the other cases, fails to distinguish his own, and utterly fails to show why the circumstance of the surgeons with its historic and functional differences is an appropriate parallel.

The "contractual" or "closed staff" operations policy has been litigated on several occasions in the state courts with the hospital's position being sustained each time against charges of discriminatory exclusion.

In *Benell v. City of Virginia*, 258 Minn. 559, 104 N.W. 2d 633 (1960) a municipal hospital hired a full-time radiologist and by resolution of the hospital committee limited the performance of X-ray procedures to this physician thereby preventing Dr. Benell, an active member of the medical staff and former part-time radiologist, from utilizing the facilities of that department.

The Supreme Court of Minnesota took special note of the facts that (1) the hospital was liable for negligence in connection with operation of the equipment in its radiology department, and (2) the American College of Radiologists advocated a closed staff policy as a practice calculated to best serve the interest of hospitals, patients and medical staffs generally. The Court found the policy neither arbitrary nor unreasonable saying it was "a phase of the steady advancement of specialization in various medical fields, designed to insure the safety of patients and to protect the hospital in the performance of its obligations to them". 104 N.W. 2d at 637. See also, *Blank v. Palo Alto - Stanford Hospital Center*, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965) and *Letsch v. Northern San Diego County Hospital District*, 246 Cal. App. 2d 673, 55 Cal. Rptr 118 (1966).

Benell has particular bearing on the present case since Respondent occupies a similar position with regard to liability for negligent injury. Further, at trial, undisputed evidence was introduced which documented the fact that many major university-affiliated teaching hospitals limit the performance of procedures in their cardiac catheterization laboratories to full-time physicians. (Finding of Fact No. 49, Appendix D. 49a) Examples of these hospitals include the University of Pennsylvania, Duke University, Peter Bent Brigham Hospital at Harvard University, Hahneman Hospital, Stanford University Hospital, Johns Hopkins, Cornell Medical Center, Children's Hospital (Pittsburgh) and Presbyterian-University Hospital (Pittsburgh).

When this Court considers (1) that Respondent's classification is reasonable (2) that Petitioner was treated exactly like the other part-time employees heading specialty functions in Respondent's hospital who were replaced by full-time directors (3) that Petitioner has only been deprived of the unique economic advantage his dual status gave him vis a vis his fellow cardiologists and (4) that he is now precisely equal in his privileges and status to all other cardiologists on Respondent's staff, Petitioner's assertion of denial of equal protection will be found to evaporate entirely.

III. RESPONDENT'S POLICY DOES NOT INTERFERE WITH THE PATIENT'S RIGHT TO BE TREATED BY THE PHYSICIAN OF HIS CHOICE.

Petitioner's claim that the Respondent Hospital's policy interferes with his patients' right to be treated by the physician of their choice is a spurious one without foundation in fact or law.

As the Supreme Court of Pennsylvania pointed out in its opinion, 453 Pa. 60, 75 (Appendix A. 14a), there has been

no representation made of any dissatisfaction of Petitioner's patients with the challenged restriction.

Although the parties stipulated that since July 1, 1969 Petitioner has referred 27 patients to hospitals other than Respondent for procedures to be performed in their cardiac catheterization laboratories, (Stipulation of Fact No. 40, Appendix F. 106a), it should be noted Petitioner further stipulated that 17 of these patients were referred to Presbyterian-University Hospital which has a similar exclusionary rule preventing Petitioner, a staff member, from using its laboratory (Stipulations of Fact Nos. 41, 42, Appendix F. 106a), which rule Petitioner has accepted without question. (R. 190a)

As the trial and appeals courts correctly indicated in their respective opinions, the record fails to disclose any impairment of the physician-patient relationship. The Laboratory procedures are diagnostic in nature with the physician staff member ultimately controlling what is to be done and when; the interpretation of the tests and the treatment to be prescribed. An attending physician is permitted to observe the actual performance of the procedures and to monitor the patient afterwards.

The policy herein complained of is not unique in the modern practice of medicine. Under the regulations of Respondent and many other similar hospitals, the patient's own physician is not the operator in certain areas of diagnosis and care, including radiology, pathology, anesthesiology, the coronary care and nuclear medicine units as well as cardiac catheterization. All of the foregoing are services provided and controlled by this and similar hospitals to be utilized by staff members as they may see fit in treating their patients.

One of the primary desiderata in implementing this policy was optimal patient care. In his opinion, the Chancellor found as facts and enumerated the benefits of the

system (Appendix D. 49a-52a), indicating that this objective is thereby achieved.

It is submitted there is no conflict between the instant decision of the Supreme Court of Pennsylvania and either *Griswold v. Connecticut*, 381 U.S. 479 (1965) or *Doe v. Bolton*, 410 U.S. 179 (1973).

Both the *Griswold* and *Doe* cases involved absolute statewide prohibitions on the conduct of physicians which made it criminal for them to perform certain actions (dispense birth control information and devices; perform abortions) thus rendering it impossible for patients legally to receive this type of treatment and medical information. Respondent's policy, however, dictated as it is in major part by concern for the patient's well-being, is not in that genus of restrictions which have been found actively to thwart both a physician's efforts to treat his patient and the patient's efforts to obtain desired treatment.* There is nothing to prevent the Petitioner physician from performing these procedures in an unrestricted laboratory.

Petitioner has not been foreclosed from practicing as a physician or as a staff member of Respondent. Nor has he been deprived of anything which he or any other physician on the Active Medical Staff of Respondent, or the other major university teaching hospitals in the country, have been permitted to do as a result of their staff membership or privileges incident thereto. The Hospital's policy is a restriction in the most minimal sense because, as the Chancellor accurately

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*As recently as *Roe v. Wade*, 410 U.S. 113 (1973), this Court recognized the propriety of reasonable regulation in this area when it said at pages 153-154:

> "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. [A] state may properly assert important interests in safeguarding health [and] in maintaining medical standards."

observed, "The performance of these procedures is but a very small part of the total practice of cardiology." (Appendix D. 59a)

The claim of infringement of patient's rights evanesces under close scrutiny when the challenged policy is examined in the light of its desirable objectives of improved patient care, enhancement of the teaching program and efficient administration leaving only Petitioner's unspoken but suspected concern about his parochial and selfish economic interests which are affected by this policy.

CONCLUSION

Under the guise of glittering generalities Petitioner attempts to create constitutional issues where none exist. The Supreme Court of Pennsylvania accurately perceived the delicate balancing of interests which has occurred when it concluded:

> "Our decision merely recognizes the difficulty and complexity of the task facing a large hospital attempting to provide comprehensive medical services. Many of the procedures which in the past were performed by a physician of the patient's choice must today be handled by hospital-employed specialists. In light of such developments, the personal desires of persons such as Dr. Adler must yield to reasonable rules and regulations intended alike for the benefit of patients and their doctors, the university and its students, the hospital and the public it serves . . . . the regulations here in question were in fact reasonable." 453 Pa. 60, 82 (Appendix A. 20a-21a)

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 749

LAWRENCE N. ADLER, Petitioner

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

RESPONSE ON BEHALF OF PETITIONER

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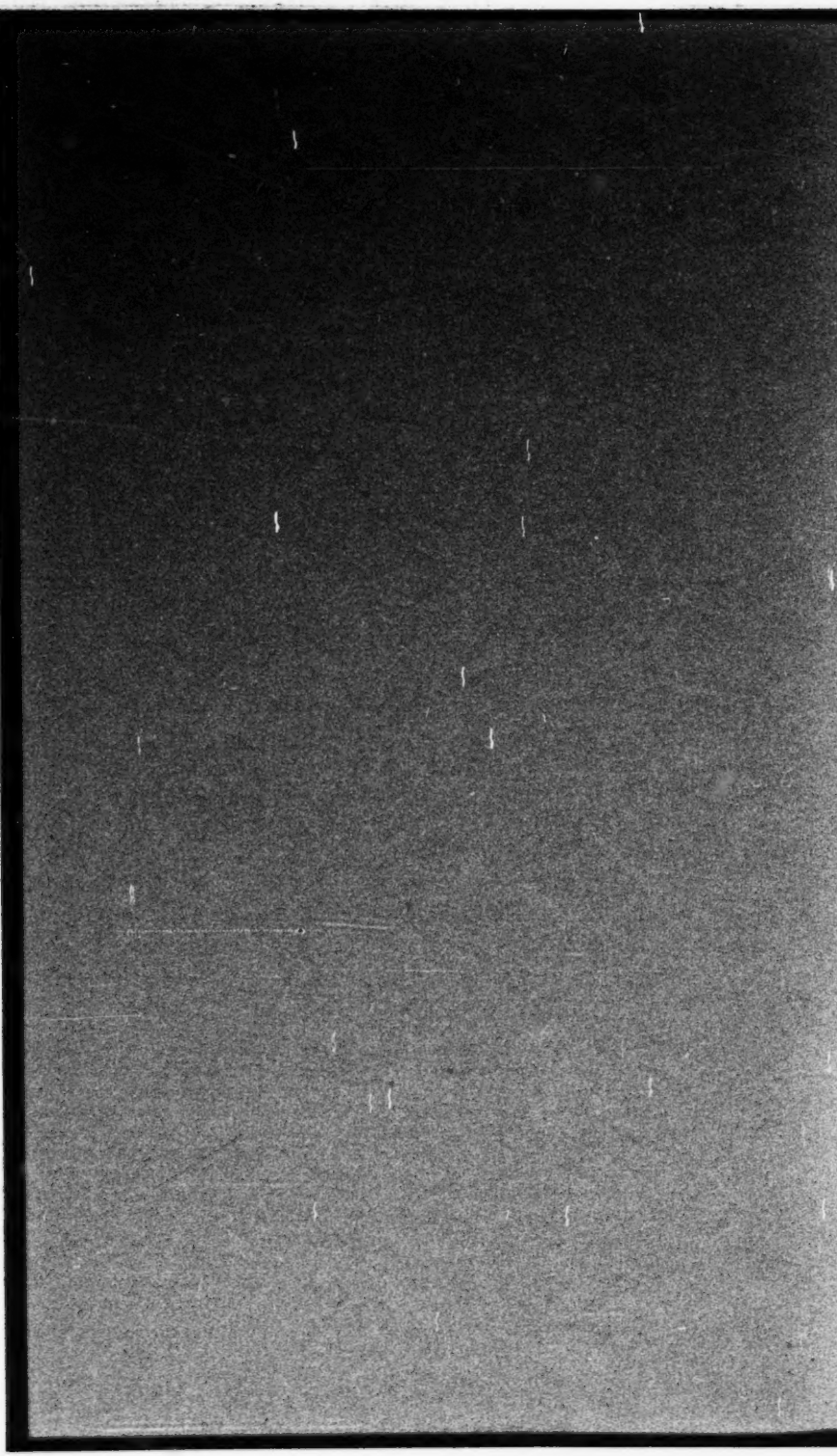

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The Petitioner, Lawrence N. Adler, pursuant to Rule 24(4) of this Court, respectfully submits the following Reply to the Respondent's Answer to Petition for Writ of Certiorari.

STATEMENT

The Petitioner, Lawrence N. Adler, filed a Petition for a Writ of Certiorari, No. 749, October Term, 1973, with this Court in order to seek judicial review of four questions of major importance not only to Petitioner but also to physicians, patients and hospitals across the nation. In that Petition Dr. Adler did not precisely detail the legal merits to his various claims, but placed primary emphasis on the importance of the case being reviewed by this Court. Unfortunately the Answer filed by the Respondent dwells heavily on factual assertions which have not been accepted by the lower courts and which are, therefore, inappropriately raised before this Court. There is moreover a suggestion that this Court lacks jurisdiction which requires some brief response.

RESPONSE

A. Jurisdiction

Respondent has suggested in its Answer that the only basis for jurisdiction of this Court is the Stipulation entered into before the Court of Common Pleas of Allegheny County (Answer 2-3).* This suggestion on the part of the Respondent is not supported by the actual record. The Stipulation with respect to state action (Appendix 100a) and the admission made by the

*References to Respondent's Answer to Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania are cited as (Answer). References to the Appendix to the Petition for Writ of Certiorari are cited as (Appendix). References to the printed record filed before the Supreme Court of Pennsylvania are cited as (R.).

Defendant in its Answer (Appendix 95a) were fully supported by an ample record developed in the court below. In addition to having received in excess of $1,500,000 under the Hill-Burton Act, the Hospital received capital funds under the accelerated Public Works Program and under the Appalachian Program. Moreover a full record was made with respect to the operating income of the Hospital. In addition to operating income figures, the Court of Common Pleas had before it the agreements between the Hospital and the University of Pittsburgh Medical School which is a state related university. Among other things, this agreement gave the University rights with respect to hospital staff appointments. Petitioner is prepared to demonstrate in its brief on the merits, should certiorari be granted, that the Stipulation relied upon by the Pennsylvania Supreme Court in passing on the Fourteenth Amendment questions raised by this case is amply supported in the record.*

B. Matters Not Supported by Findings of the Courts Below

Without regard to the inappropriateness of Respondent's remarks concerning Petitioner, there is serious objection to making assertions in petitions or answers filed in this Court which are not based on the record or which do not accurately reflect the findings of the court below. In three specific

*While the Supreme Court of Pennsylvania accepted the Stipulation with respect to "state action" and did consider the Fourteenth Amendment questions raised by Petitioner, the Court, unfortunately, was in error when it referred to a "paucity of data in the record" to support the stipulation (Appendix 10a). This may be the fault of both counsel since the supporting material available to the trial court and contained in the record was never specifically referred to in the briefs filed in the Pennsylvania Supreme Court. However, since the Pennsylvania Supreme Court had jurisdiction of the appeal on state grounds, neither party needed to brief the "state action" issue in detail.

instances the Answer filed by the Respondent does not accurately reflect the evidence and the findings of the court below.

Shortly after Petitioner sought a review of the Hospital decision forbidding him to use the cardiac catheterization facilities of the Hospital, he was discharged from employment as the director of the Coronary Care Unit of Respondent Hospital. At that time certain members of the Hospital management did make accusations of misconduct against the Petitioner. The issue of Petitioner's firing by the Hospital was never litigated. The courts below were careful to find that, in addition to the fact that no challenge had been made as to Petitioner's discharge as an employee, mere *allegations* existed as to supposed misconduct. Unfortunately, despite the careful language of the findings of the Court of Common Pleas of Allegheny County (Appendix 48a) and of the Majority Opinion of Pennsylvania Supreme Court (Appendix 5a) reflecting their recognition that accusations of misconduct were mere unproven allegations, Respondent has chosen to treat the termination of Petitioner's employment as arising out of proven misconduct (Answer 10-11).

Likewise Respondent has devoted considerable space to allegations that Petitioner actively formulated the policy now in dispute. Again, the statements contained in Respondent's Answer do not measure up to the carefully drafted findings of the Court of Common Pleas of Allegheny County on this issue. (Note especially Finding 19, Appendix 39a.*)

*Even these findings by the Court of Common Pleas were vigorously disputed by Petitioner. Accepting, as we must, the court's finding that Petitioner participated in the decision to deny the oral request of the medical partner of a physician desiring to perform occasional procedures, such conduct would never bar Petitioner from raising the constitutional issues which now are presented by this petition. *Abie State Bank v. Weaver*, 282 U.S. 765 esp. at 772-777 (1931) and *Ex Parte Garland*, 71 U.S. 333 (1866).

Finally, it is asserted that Petitioner's interests in this litigation are purely parochial and selfish interests. While this argument has been made at every level in these proceedings by the Respondent Hospital, neither of the courts below have accepted this characterization of Petitioner's motivation. In point of fact it is clear that Petitioner cannot make as much personal income from the performance of time consuming procedures in a cardiovascular laboratory as he can derive from a busy office schedule and consulting practice as a cardiologist.

C. Legal Considerations

Petitioner will not respond to the detailed arguments set forth at pages 12-24 of Respondent's Answer other than to note that Respondent again clearly equates the regulation promulgated by the chief of medicine at Respondent Hospital with a legislative or administrative enactment of a duly constituted federal or state legislature or other public authority (Answer 15). It is precisely the conduct of private corporations or agencies like the Respondent who are engaged in implementing public, state and federal programs which gives rise to the questions which Petitioner respectfully submits ought to be reviewed by this Court.

Respectfully submitted,

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